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IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

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**ROBERT G. BORG, WARDEN,**

Petitioner,

v.

**ALLEN R. TURK,**

Respondent.

---

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

---

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## QUESTIONS PRESENTED

Does the Ninth Circuit's rule that a state court's competency determination is subject to de novo review on federal habeas corpus conflict with the decision of this Court in *Maggio v. Fulford* and the decisions of other Courts of Appeal that competency determinations are entitled to a presumption of correctness?

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## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

---

The petitioner respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, filed on May 5, 1993 with rehearing denied and rehearing on banc denied on June 24, 1993.

## OPINIONS BELOW

A copy of the unpublished opinion of the United States Court of Appeals for the Ninth Circuit is attached to this petition as Appendix A. A copy of the unpublished order denying rehearing and rejecting rehearing en banc is attached as Appendix B. A copy of the unpublished order of the District Court denying the petition for writ of habeas corpus appears as Appendix C. The unpublished decision and orders of the state courts are attached as Appendices D through G.

## JURISDICTION

The Judgment of the Court of Appeals for the Ninth Circuit was entered on May 5, 1993. Rehearing was denied and rehearing en banc rejected on June 24, 1993. This petition for writ of certiorari followed within 90 days. 28 U.S.C. § 2101(c); Supreme Court Rule 13.1, 13.4. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

## FEDERAL STATUTES INVOLVED

Title 28, section 2254(d) provides in pertinent part:

> In any proceeding instituted in a Federal curt by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit:
>
> * * *
>
> (8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported

by the record:

And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set forth in paragraphs numbered (1) to (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph numbered (8) that the record in the State court proceeding, considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous.

## STATEMENT OF THE CASE

### A. State Proceedings

On November 10, 1980, an information was filed by the Alameda County District Attorney charging respondent with murder. CT 1-3.[1/] After twenty court days of trial, a jury returned a verdict of first degree murder with use of a deadly weapon. The trial court reduced the finding to second degree murder and imposed an aggregate sentence of 19 years to life. CT 37, 44-45.

Petitioner unsuccessfully appealed to the California Court of Appeal, which affirmed the conviction in an unpublished opinion on April 20, 1984. Appendix D.

Petitioner initiated state collateral proceedings on March 24, 1988, in the state trial court, claiming that he had submitted substantial evidence during trial about his competency and that the trial judge abused his discretion in failing to order a competency hearing pursuant Cal. Penal Code § 1368. The superior court denied habeas corpus relief by order on May 2, 1988, finding that respondent made no prima facie showing to support relief. Appendix E. Respondent's subsequent habeas corpus petitions to the state court of appeal and state supreme court (in which he also claimed that his appellate counsel was ineffective for failing to raise the competency issue on

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1. "CT" refers to the Clerk's Transcript of state trial proceedings lodged in the District Court with the Answer.

direct appeal) were summarily denied. Appendices F and G.

B. Federal Proceedings

Respondent sought federal habeas corpus relief under 28 U.S.C. § 2254. On February 27, 1992, the District Court denied relief, finding on the basis of "fairly supported factual conclusions" that the state trial court correctly decided no substantial evidence existed to warrant reasonable doubt about respondent's competency to stand trial. Appendix C at 35. The ineffectiveness claim was also rejected. *Id.*

On appeal to the Ninth Circuit, a divided panel reversed the District Court's judgment and ordered respondent's state conviction for murder vacated. Appendix A at 28. In doing so, the majority applied a de novo standard of review to the state trial judge's finding of competency and concluded that a reasonable judge should have experienced doubt with respect to respondent's competency to stand trial. *Id.* at 25 ("'On appeal, we inquire "whether a reasonable judge . . . should have experienced doubt with respect to competency to stand trial."' [Citations] The test is not whether the trial judge did in fact experience doubt, but whether he or she *should* have experienced doubt.").

Notwithstanding the dissent's insistence that the precedential authority of this Court commanded a deferential standard of review, Appendix A at 29, the majority refused to discuss or mention *Maggio v. Fulford*, 462 U.S. 111, 117 (1983), which held that state court determinations of competency are entitled to a

presumption of correctness under 28 U.S.C. § 2254(d). Rehearing and rehearing en banc were denied. Appendix B.

## C. Statement of Facts

The facts underlying respondent's conviction for murder are undisputed and were succinctly recited in the state appellate court's 1984 opinion affirming the judgment: "Juanita Whitaker died as a result of severe head injuries; her body was found near appellant's truck. [Turk] told at least two acquaintances that he had beaten a woman and thought he killed her." Appendix D at 37.

Respondent's constitutional attack centered on the events occurring midway through trial, which began on August 12, 1981. On August 24, the prosecution had presented its case and rested. CT 21. The defense case began the next morning. CT 22; 2 RT 229-64.[2/] According to defense counsel's earlier opening statement, the defense intended to show drug use and mental illness that mitigated the crime to manslaughter. RT (8/19/81) 338-44.[3/] By the afternoon of August 25, however, the defense attorneys were informing the trial judge that respondent had just told them that he no longer wanted any psychologist to testify and that he wanted to testify himself, and in particular testify about his religious views. 2 RT 265-66. Counsel thought that a competency

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2. "RT" refers to the Reporter's Transcript of trial proceedings lodged in the District Court with the Answer.

3. The opening statement is contained in the Reporter's Transcript volume of jury voir dire.

examination under Cal. Penal Code § 1368 was in order. 2 RT 266.[4]

The trial judge disagreed, commenting: "On the basis of what I have observed, him sitting here, observing the defendant, observing him while witnesses were testifying, observing him, while I didn't hear what he was saying to you, observing him in conversation with you, looking at him, I feel that he is able to cooperate with his defense." *Id.* The court then questioned respondent as follows:

> The Court: Let me ask your client certain questions. I wouldn't ask him about this case. I wouldn't ask him the facts of the case.
> Mr. Turk, do you know what you are on trial for?

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4. Under state law, competency to stand trial requires that a defendant be able to understand the nature and purpose of the proceedings taken against him and to conduct his own defense in a rational manner. *People v. Pennington*, 66 Cal.2d 508, 515; 58 Cal.Rptr. 374, 379, 426 P.2d 942, 947 (1967). A competency hearing is necessary if the trial judge entertains a bona fide doubt raised by substantial evidence of present mental incompetence. *Id.* at 517-18, 58 Cal.Rptr. at 379-81, 426 P.2d at 947-49.

Cal. Penal Code § 1368 provides for the suspension of criminal proceedings when a doubt arises in the mind of the trial judge about the competency of a defendant. Once proceedings are suspended a court or jury trial to determine competency follows. Cal. Penal Code § 1369. If the defendant is found mentally competent, the criminal process resumes, the trial proceeds, and the judgment may be pronounced. If, on the other hand, the defendant is found mentally incompetent, the trial or judgment must be suspended until the person regains his mental competence. Cal. Penal Code § 1370.

> The Defendant: Yes, I do.
> The Court: What?
> The Defendant: Murder, 187 of the Penal Code.
> The Court: You understand what has been going on in court?
> I am not saying you necessarily agree or agree with what has been said. Have you listened to the witnesses?
> The Defendant: I heard them.
> The Court: You have heard what they said?
> The Defendant: I heard what they said.
> The Court: Do you feel you are capable of going on with this trial?
> The Defendant: Sure. I can go on with it.

2 RT 266-67.

Defense counsel, in response to the court's question about the basis of his competency concern, stated that respondent had delusions of a "religious nature." 2 RT 267. Respondent would not allow counsel to call psychologists to establish a mental defense, a decision which in counsel's view was not rational. 2 RT 268. Turning to respondent, the court advised him that he had competent counsel and asked whether he wished to say anything. Respondent replied: "Well, I just, you know, I'd rather go to trial as it is right now without anyone coming, any expert witness. What I didn't want was N.G.I., the defense for diminished capacity. I don't want to deal with that." 2 RT 269. Further questioning from the court showed that respondent understood the purpose

of the diminished capacity defense and recognized that he had "lawyers of experience and understanding." 2 RT 269-70. The court then acceded to respondent's previous desire to have a Black psychiatrist, Dr. Joseph Davis, appointed to examine him that evening. 2 RT 270-71.[5/] Concluding the afternoon session, the court reaffirmed its view that a § 1368 hearing was inappropriate:

> And as I listen to him, I honestly feel that he is competent to proceed with this trial. I have no doubt about it. I mean, he may have, for example, what you call a psychotic episode, may fade in and psychotic episode, fade in and out. I am not a psychiatrist and I'm not a psychologist. However, I would say for four years I presided over the psychiatric court in San Francisco, the commitment court, five days a week, four years. That was in San Francisco.
> I had something to do with the writing of the Lanterman-Petris-Short Act. I had a great deal to do with it. I testified before the Legislature. I am not an oracle, of course not.
>
> But as I talked to the defendant, I feel that he has the ability to proceed and 1368 would

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5. Dr. Davis later testified at trial that respondent exhibited no inappropriate behavior or disorganized thought during the mental examination, and that a schizophrenic illness, which Dr. Davis diagnosed, was in remission. 4 RT 225, 229, 282.

be highly inappropriate.

2 RT 271.

The court also noted that in determining respondent to be competent it took into account the reports of two alienists, Drs. Gudiksen and Burstein, who had examined respondent under appointment from the court. 2 RT 272.[6/]

The following morning, defense counsel renewed the motion to suspend proceedings under § 1368. Counsel reported that respondent had spoken the previous Saturday to Dr. Bastian, a psychologist, who considered him

> psychotic at the time she was interviewing him. She saw him again this morning. She says the same thing. I make the motion under 1368 because I don't believe Mr. Turk at this point is capable of cooperating with counsel. He does not know the difference between legal guilt and moral or spiritual guilt. And, therefore, not knowing that distinction, he refuses to allow us to proceed to present psychological evidence in his defense. And he also will not accede to our advice that he testify. He says he wants to withdraw his plea of not guilty by reason of

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6. Both Drs. Gudiksen and Burstein later testified at trial that they found no basis for a mental defense. 5 RT 39-41, 169, 174-75.

> insanity; wants to withdraw his defenses under diminished capacity, wants to proceed without those defenses. As a lawyer, I can't competently represent the man, given his state of mind where he fails to know the difference between legal guilt and spiritual guilt. Therefore, I consider him a 1368, your honor. And that is why I make the motion.

2 RT 278-279.

The court questioned whether the sudden finding by Dr. Bastian that respondent was incompetent resulted only "because he wouldn't let [counsel] present the kind of defense that [counsel] would like to present []." 2 RT 279.

During further discussion, respondent expressed the desire to relieve his present attorneys because of their disagreement with him over the mental defense. 2 RT 281. Respondent explained that he had never agreed to the defense and was perfectly willing to accept the consequences of forgoing it. 2 RT 282. He also recognized that he would have to live with the decision and was emphatic on the subject. 2 RT 283-284, 291-292. "I want to go straight into this trial as it is. I want to withdraw the plea of not guilty by reason of insanity, N.G.I., and I don't want the matter of diminished capacity." 2 RT 284.

The court declined to relieve counsel. It reiterated that it was "fairly firmly convinced there is no 1368. None whatsoever. None." 2 RT 292. Concluding on the issue of competency, the court stated:

> I deny the motion to suspend the proceedings. I do it on the basis of my [sic] statement you made about what the psychologist said, about the report that I have in the file from Gudiksen & Burnstein, from my observations of the defendant, mere statement that he may be, and you are distinguishing between legal guilt and religious guilt. He is competent to stand trial and cooperate with counsel.

2 RT 294.

The trial proceeded, with respondent's mental state nonetheless prominently in issue.

## REASONS FOR GRANTING THE WRIT

In direct conflict with the decisions of this Court, the Ninth Circuit has ruled that a federal habeas court may vacate a state judgment and compel a new trial by independently deciding that a state trial judge should have entertained a bona fide doubt about a criminal defendant's competency to stand trial, even if the trial judge's express determination of competency finds support in the record. The Ninth Circuit has ignored the application of 28 U.S.C. § 2254(d)(8) and the existence of *Maggio v. Fulford*, 462 U.S. 111, 117 (1983), in which this Court required federal habeas courts to accord a presumption of correctness, if fairly supported by the record, to a state court's factual finding that no competency hearing is required. *See also Demosthenes* v. *Baal*, 495 U.S. 731, 735 (1990) (state court's conclusion regarding a defendant's competency is entitled to presumption of correctness); *Miller v. Fenton*, 474 U.S. 110, 113, 116-17 (1985) (distinguishing presumption of correctness applicable to finding of competency from de novo standard of review applicable to finding of voluntariness).

The Ninth Circuit has also silently disavowed its own earlier decision in *Evans v. Raines*, 800 F.2d 884, 886-87 (9th Cir. 1986), correctly applying *Maggio*, and repudiated with the same silence the decisions of the other United States Courts of Appeal which have held, in light of *Maggio*, that a state court's finding as to a defendant's competency to stand trial is presumed correct. *See Balfour v. Haws*, 892 F.2d 556, 560 (7th Cir. 1989) (state court's finding of no *bona fide* doubt as to

competency entitled to presumption of correctness); *Lafferty v. Cook*, 949 F.2d 1546, 1550, 1555 (10th Cir. 1991), *cert. denied*, 112 S.Ct. 1942 (1992) (state finding presumptively correct if correct legal standard of competency applied); *Price v. Wainwright*, 759 F.2d 1549, 1552 (11th Cir. 1985) (same); *Davis v. Wyrick*, 766 F.2d 1197, 1201 (8th Cir. 1985) (competency to stand trial is issue of fact); *Patterson v. Cuyler*, 729 F.2d 925, 931 (3d Cir. 1984) ("inescapable conclusion" of *Maggio* is that competency is question of fact even if ultimate issue characterized as a mixed question of law and fact).[7]

The Ninth Circuit's opinion makes nugatory every state judge's finding of competency, insofar as the finding rests on the trial judge's personal and contemporaneous observation of the defendant in open court and any credibility determinations relating to the issue. Yet, this Court has held that assessments of credibility and demeanor are crucial to the proper resolution of competency to stand trial, *see Miller v. Fenton*, 474 U.S. at 116-17, and that the adjudication of competency to stand trial in open court on a full record serves as a further guarantee of the reliability and integrity of the

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7. In dictum placed in footnotes, two appellate courts have indicated that the determination of competency is a mixed question of law and fact limiting the application of a presumption of correctness under 28 U.S.C. § 2254(d)(8). *Bouchillon v. Collins*, 907 F.2d 589, 593 n. 11 (5th Cir. 1990); *James v. Singletary*, 957 F.2d 1562, 1574 n. 18 (11th Cir. 1992). Neither case cites or discusses *Maggio*. The dictum is irreconcilable with this Court's analysis in *Miller v. Fenton*, 474 U.S. at 116-117, distinguishing the presumption of correctness accorded competency determinations from the de novo review required of the mixed fact/law question of voluntariness.

state fact-finding process on the issue. *Id.* at 117.

The Ninth Circuit's refusal to yield to, let alone discuss, this Court's dispositive decisions undermines the judicial process and deprives states within the Ninth Circuit of the uniform application of constitutional law. Substantively, the Ninth Circuit's rule invites retrospective, de novo redetermination by federal judges of factual matters already resolved by "one judicial actor better positioned than another to decide the issue." *Id.* at 114. In the Ninth Circuit, state prisoners are now free to challenge presumptively valid judgments on the grounds that a state trial judge's personal and contemporaneous assessment of their mental state is entitled to no deference in federal court. State judgments in the Ninth Circuit now rise or fall on a federal judge's independent review of previously determined facts from a cold and dated state record. The process strikes at the heart of finality and comity, considerations of which this Court has placed at the forefront of recent decisions determining the proper scope of federal habeas review. *See Teague v. Lane*, 489 U.S. 288, 308 (1989); *McClesky v. Zant*, __ U.S. __, 111 S.Ct. 1454, 1474 (1991); *Coleman v. Thompson*, __ U.S. __, 111 S.Ct. 2546, 2565 (1991).

The Ninth Circuit has again adopted a rule peculiar to itself and at odds with the decisions of this Court and the views of other Courts of Appeal.[8/] It imposes on the

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8. The Ninth Circuit's inclination to chart its own course is reflected in two recent cases before this Court. *See Godinez v. Moran*, __ U.S. __, 61 U.S.L.W. 4749, 4750-51, n. 5 (1993) (only Ninth Circuit applies "reasoned choice" standard to waivers of counsel); *United States v. Padilla*, __ U.S.__, 113 S.Ct. 1936, 1938 (1993) ("The Ninth Circuit appears to stand alone in embracing the

states of this circuit a rule which is at best unpredictably and haphazardly applied, and in all circumstances a rule which is plainly in conflict with federal jurisprudence. Certiorari should be granted so that the Ninth Circuit receives unequivocal guidance on the applicable standard for review of a state trial court's competency determination.

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'coconspirator exception' [to the rule regarding who may challenge the constitutionality of a search or seizure]"). This Court reversed the Ninth Circuit in both cases.

## ARGUMENT

Twelve years ago, the state trial court in this case expressly determined that it had no reasonable doubt about respondent's competency to stand trial after observing him during a lengthy murder trial, questioning him on his understanding and awareness of the proceedings, and relying on the reports of two court-appointed alienists (a psychiatrist and a psychologist), who contemporaneously examined petitioner and found no basis for a mental defense.

The Ninth Circuit accorded no deference to this factual finding. The failure is unexplained. Nor did the majority of the panel which rendered the opinion mention 28 U.S.C. § 2254(d)(8), which imposes a presumption of correctness for a state court factual finding fairly supported by the record. Also omitted was any reference to this Court's decision in *Maggio v. Fulford,* 462 U.S. 111, which held that a trial judge's determination about the necessity of a competency hearing raises a factual conclusion to be reviewed under the deferential standard of § 2254(d), *id.* at 116-17, and that "[b]efore a federal habeas court undertakes to overturn factual conclusions made by a state court, it must determine that these conclusions are not 'fairly supported by the record.'" *Id.* at 117. Further, the Ninth Circuit's opinion contained no acknowledgment that its own circuit case law and the decisions of the other Courts of Appeal interpreting *Maggio* require a federal habeas court to accord a presumption of correctness to a state court's determination of competency to stand trial. *Evans v. Raines*, 800 F.2d at 887; *Balfour v. Haws*, 892 F.2d at 560;

*Lafferty v. Cook*, 949 F.2d at 1550, 1555; *Price v. Wainwright*, 759 F.2d at, 1552; *Davis v. Wyrick*, 766 F.2d at 1201; *Patterson v. Cuyler*, 729 F.2d 925 at 931.

In the opinion itself, the Ninth Circuit did not question the trial court's application of the appropriate legal standard in making its finding of comptency, or deny the existence of support in the record for the trial court's finding. The Ninth Circuit opinion noted only that the "evidence" in support of the trial court's finding "did not, however, erase the doubt that the other evidence had created about petitioner's competence to stand trial." Appendix A at 27.

The Ninth Circuit's opinion presupposed that "the other evidence" -- the opinions of respondent's trial counsel and the defense expert, Dr. Bastian -- was credible. However, it is precisely this kind of evidence which the trial court is under no obligation to credit. *Maggio v. Fulford*, 462 U.S. at 117-18. The Ninth Circuit failed to appreciate that any evidence supporting a bona fide doubt of competency must be credible and that it is the trial court which makes the determination of credibility. Evidence whose credibility the trier of fact rejects cannot create a bona fide doubt. *See id.* at 119-20 (White, J., concurring). Credible evidence supported a finding of competency in this case, as the dissent below noted without contradiction. Appendix A at 30-31.

Without any discussion of this Court's controlling precedent or the decisions of other Courts of Appeal, the Ninth Circuit purported to base its de novo review of the trial court's competency finding on two recent circuit opinions. The cases in question are *Hernandez v. Ylst*, 930 F.2d 714, 716 (9th Cir. 1991), and *United States v.*

*Lewis*, 991 F.2d 524 (9th Cir. 1993).[9] The Ninth Circuit opinion cited them for the proposition that the standard of review on the issue of competency requires an objective inquiry about whether a reasonable judge should have experienced doubt with respect to competency to stand trial. Appendix A at 25.

Both *Hernandez* and *Lewis* fail to cite or discuss *Maggio*. Neither is sound authority for a view at odds with *Maggio's* clear statement that a deferential standard is not only appropriate but congressionally compelled under 28 U.S.C. 2254(d)(8), if the trial court's finding of competency is fairly supported by the record. *See Maggio v. Fulford*, 462 U.S. at 113, 117.

These cases are at odds even with other recent decisions of the Ninth Circuit, which apparently maintains two published and conflicting standards for reviewing a state court's determination of competency to stand trial. The Ninth Circuit's most recent published pronouncements on the subject, none of which is cited in the present opinion, offer no predictability on future rulings. In *Brewer v. Lewis*, 989 F.2d 1021, 1027 (9th Cir. 1993), the Court of Appeals cited *Maggio* and stated that it was obligated to accord presumption of correctness to the state court's determination of competency to plead guilty. Months earlier, however, a different panel of the Ninth Circuit questioned but did not decide whether the presumption of correctness under 28 U.S.C. § 2254(d)

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9. *United States v. Lewis* also applied the "reasoned choice" standard for determining competency to plead guilty, a standard which this Court recently rejected in *Godinez v. Moran*, 61 U.S.L.W. at 4751.

extended to a court's finding of competency to waive a constitutional right. *Moran v. Godinez*, 972 F.2d 263, 266 & n. 6 (9th Cir. 1992), *reversed, Godinez v. Moran*, __ U.S. __, 61 U.S.L.W. 4749 (1993).[10/] Added to this mix are *United States v. Lewis* and *Hernandez v. Ylst*, cases standing for the proposition that the Ninth Circuit accords no presumption of correctness to a state court finding of competency. *See* Appendix A at 25.

In the present case, the Ninth Circuit has unequivocally applied the wrong standard without apparent consideration of the conflicting precedent of this Court, the circuit's own inconsistent opinions, or the decisions of other Courts of Appeal. The result cannot be reconciled with principled decision-making and the uniform application of the law. Certiorari is essential to resolve the conflict and to give the states of the Ninth Circuit the benefit of decision-making tethered to this Court's jurisprudence.

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10. In reversing *Godinez*, which involved whether the standard of competency to plead was higher than the standard of competency to stand trial, this Court had no occasion to address the application of 28 U.S.C. § 2254(d) to competency determinations. The Ninth Circuit had found the presumption of correctness irrelevant in light of its erroneous conclusion that the state court applied the wrong legal standard in making its finding. *See Godinez v. Moran*, 61 U.S.L.W at 4750.

## CONCLUSION

For the foregoing reasons, we respectfully request that the Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit be granted.

DATED: August 2, 1993

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GERALD A. ENGLER
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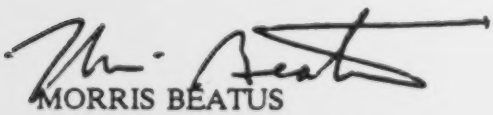

MORRIS BEATUS
Deputy Attorney General
[Counsel of Record]

Attorneys for Petitioner

# APPENDIX A

**FILED MAY 5, 1991**
NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ALLEN R. TURK,

Plaintiff-Appellant,

v.

ALAMEDA COUNTY;
ROBERT G. BORG, Warden,
California, Folsom State Prison,

Defendants-Appellees.

No. 92-15535
D.C. No.
CV 90-00079 VRW
MEMORANDUM*

---

Appeal from the United States District Court
for the Northern District of California
Vaughn R. Walker, District Judge, Presiding
Submitted December 17, 1992**
San Francisco, California

Before: NORRIS, BEEZER, and KLEINFELD, Circuit Judges

Allen Turk appeals pro se from the district court's

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously finds this case suitable for decision without oral argument. Fed. R. App. P. 34(a) and Ninth Circuit Rule 34-4.

denial of his habeas petition. In 1981, Turk was convicted of second degree murder, use of a deadly weapon, and violation of parole. In his habeas petition, Turk argues that (1) the trial court denied him due process by failing to hold a hearing to determine whether he was competent to stand trial; and (2) his counsel rendered ineffective assistance by failing to raise the competency issue on appeal. We reverse and remand.

We review a trial court's denial of a competency hearing to see whether the evidence raised a bona fide doubt as to the defendant's competency to stand trial. "On appeal, we inquire 'whether a reasonable judge...should have experienced doubt with respect to competency to stand trial.'" Hernandez v. Ylst, 930 F.2d 714, 716 (9th Cir. 1991) (quoting de Kaplany v. Enomoto, 540 F.2d 975, 983 (9th Cir. 1976) (en banc), cert. denied, 429 U.S. 1075 (1977)).[1/] The test is not whether the trial judge did in fact experience doubt, but whether he or she should have experienced doubt. See Hernandez, 930 F.2d at 716 ("'The test is an objective one.'" (quoting Pedrero v. Wainwright, 590 F.2d 1383, 1388 (5th Cir.) (Wisdom, J.), cert. denied, 444 U.S. 943 (1979)).

Here, there was sufficient evidence to create a bona fide doubt as to the defendant's competence to stand trial.

First, Turk's counsel believed that Turk was incompetent to stand trial. Defense attorney Comiskey

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1. Cf. United States v. Lewis, No. 92-50384, slip op. at 3541 (9th Cir. Apr. 9, 1993) ("A court reviewing a record for evidence of a defendant's competence in a prior proceeding must determine 'whether evidence of incompetence was such that a reasonable judge would be expected to experience a genuine doubt respecting the defendant's competence.'" (citation omitted)).

moved to have a competency hearing under California Penal Code § 1368 on August 25, 1981. Defense attorney Murray made a second § 1368 motion the following day. A defense attorney's opinion about his or her client's competence to stand trial carries weight. Hernandez, 930 F.2d at 718 ("While the opinion of [defendant's] counsel certainly is not determinative, a defendant's counsel is in the best position to evaluate a client's comprehension of the proceedings."). Defense attorney Comiskey explained that his client had delusions of a "religious nature." Red at 6.

Second, Turk was prone to "psychotic episodes." As the trial judge said:

> [A]s I listen to him, I honestly feel that he is competent to proceed with this trial. I have no doubt about it. I mean, he may have, for example, what you call a psychotic episode, may fade in and ... out.

2 RT 271.

Third, petitioner's counsel reported to the court on August 26, 1981, that Dr. Sheila Bastian, a psychologist, had interviewed the petitioner and found him "psychotic at the time she was interviewing him." Red at 7; 2 RT 278. Dr. Bastian had examined the petitioner that morning. Dr. Bastian later appeared before the court and testified that she suspected that petitioner had "organic brain syndrome," possibly associated with "at least five head injuries." Red at 9; 2 RT 494.

Fourth, petitioner had a long history of

psychological problems for which he had been committed to mental hospitals on approximately 10 occasions. The last hospitalization appears to have taken place in 1974, about seven years before the trial. Dr. Bastian testified that she had a medical history file with "almost forty doctors' reports in it," with "ninety-eight percent" of the reports concluding that petitioner was a paranoid schizophrenic. Red at 9; 2 RT 484. These reports were apparently made during the time petitioner was hospitalized.

Finally, petitioner suffered a head injury just a few days before the start of the trial.

All these facts taken together established a bona fide doubt as to the defendant's competency to stand trial.

To support its argument that no hearing was necessary, the government relies on the testimony of Drs. Burstein and Gudiksen, who testified before the court on the petitioner's mental defenses. Dr. Burstein, a psychologist, testified that records of petitioner's psychiatric history showed that no one had diagnosed petitioner as schizophrenic after 1974. He also opined that the many doctors who had, before 1975, diagnosed petitioner as being schizophrenic were wrong in making that diagnosis. Dr. Gudiksen, a psychiatrist, testified that petitioner did not suffer from paranoid schizophrenia at the time she examined him or at the time of the crime. Instead, she believed that petitioner had an "anti-social personality disorder" without "organic brain syndrome." Red at 10-11. This evidence did not, however, erase the doubt that the other evidence had created about petitioner's competence to stand trial.

Because petitioner's trial took place more than a

decade ago, a retrospective determination of petitioner's competency at that trial is no longer possible. We therefore vacate petitioner's convictions. The state is free to retry the petitioner, "assuming, of course, that at the time of such trial he is competent to be tried." Drope v. Missouri, 420 U.S. 162, 183 (1975).[2/]

**REVERSED** and **REMANDED** with instructions to grant the petition for a writ of habeas corpus.

---

2. Because we grant the habeas petition on due process grounds, we do not reach the ineffective assistance of counsel claim.

Turk v. Alameda, No. 92-15535
Kleinfeld, J., dissenting:

I respectfully dissent.

The federal habeas corpus statutory standard at 28 U.S.C. § 2254(d)(8) controls our review of the state court's determination that no competency hearing was needed. Maggio v. Fulford, 462 U.S. 111, 117 (1983). The statute requires us to accord a "presumption of correctness" to the state court's determination. See Evans v. Raines, 800 F.2d 884, 886 (9th Cir. 1986). The determination that no competency hearing was required is factual, and we cannot overturn it if it was "fairly supported by the record."' Maggio v. Fulford, 462 U.S. 111, 117 (1983) quoting 28 U.S.C. § 2254(d)(8). We cannot substitute our judgment as to the credibility of evidence for that of the state court. Id. at 113.

The majority has not discussed application of Maggio, relying instead upon our subsequent decisions in Hernandez v. Ylst, 930 F.2d 714, 716 (9th Cir. 1991), and United States v. Lewis, No. 92-50384 (9th Cir. 1993.) Neither of these cases cites or discusses Maggio, so they cannot be treated as circuit decisions interpreting the Supreme Court decision. If they were precedent on the question presented, then we would be required to follow them. United States v. Mandel, 914 F.2d 1215, 1221 (9th Cir. 1991). But they are not, because the question of standard of review was not at issue and applicability of Maggio was not considered in those cases. We must therefore follow Maggio. Cross v. Bruning, 413 F.2d 678, 680 (9th Cir.), cert. denied, 396 U.S. 970 (1969). The

only Ninth Circuit case citing Maggio is Evans v. Raines, 800 F.2d 884, 887 (9th Cir. 1986), which applies the rule that determinations of competency are entitled to a presumption of correctness.

The majority correctly articulates the substantive test as whether a reasonable judge should have experienced doubt as to Turk's competency. Under Maggio, we must accord a presumption of correctness to the state court determination to the contrary, and uphold it if it was fairly supported by the record. Applying this deferential standard, I do not think we can set aside the state court determination.

Turk was charged with and convicted of murder, for beating a woman to death. Turk's defense was to be that because of his diminished capacity, he was only capable of manslaughter. Midway through trial, Turk told his lawyer that he did not want to use the diminished capacity defense. Turk's lawyer then requested a competency hearing. Turk's lawyer said that because Turk could not distinguish between legal and spiritual guilt, Turk would not accede to his counsel's suggestion that he offer diminished capacity as a defense.

The state judge reviewed reports on Turk's mental health written by three different specialists. One psychologist reported that Turk had brain damage and was psychotic, but two other experts contradicted this opinion. One psychiatrist found that although Turk had been schizophrenic, his disease was in remission, and the other diagnosed Turk as having an anti-social personality disorder, but not schizophrenic.

The state trial judge engaged Turk in a colloquy. Turk told the judge, "Well, I just, you know, I'd rather go

to trial as it is right now without anyone coming, any expert witness. What I didn't want was N.G.I., the defense for diminished capacity. I don't want to deal with that." He also told the judge, "I want to go straight into this trial as it is. I want to withdraw the plea of not guilty by reason of insanity, N.G.I., and I don't want the matter of diminished capacity." Unlike us, the state judge observed Turk as Turk spoke, and observed Turk throughout a twenty day trial. The judge concluded, based on his observation of Turk and his colloquy with him, the psychiatric reports, and counsel's recommendation, all considered in light of the judge's own extensive experience presiding in psychiatric court, that "as I listen to him, I honestly feel he is competent to proceed with this trial -- I have no doubt about it," and "as I talked to the defendant, I feel that he has the ability to proceed."

Those are the critical findings. The record fairly supports them. Turk's own statements show reasoned analysis and judgment about how he wished to proceed, and evinced his understanding of the proceedings and his ability to make decisions based upon realistic perception of the alternatives. The colloquy, along with the trial judge's other extensive observation of Turk and two of the psychiatric reports, afforded a substantial evidentiary basis to the state trial judge for his determination that there was no bona fide doubt as to Turk's competency to stand trial.

If we were permitted to substitute our judgment de novo, we might conclude that the report of brain damage and psychosis required a hearing. But we may not, under Maggio, accord so little deference to a state court

determination. We should therefore affirm.

# APPENDIX B

**FILED JUNE 24, 1993**
NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ALLEN R. TURK,

Plaintiff-Appellant,

v.

ALAMEDA COUNTY;
ROBERT G. BORG,
Warden, California, Folsom State Prison,

Defendants-Appellants.

No. 92-15535
D.C. No.
CV 90-00079VRW

**ORDER**

Before: NORRIS, BEEZER, and KLEINFELD, Circuit Judges

The panel, as constituted above, has voted unanimously to reject the suggestion for a rehearing en banc.

Judges Norris and Beezer voted to deny the petition for rehearing, and Judge Kleinfeld would grant it.

The full court has been advised of the suggestion for en banc rehearing and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is **DENIED**, and the suggestion for a rehearing en banc is **REJECTED**.

# APPENDIX C

**FILED: FEBRUARY 27, 1992**

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

ALLEN R. TURK,

Petitioner,

v.

ROBERT BORG, Warden, Folsom State Prison; PEOPLE OF THE STATE OF CALIFORNIA; ALAMEDA COUNTY SUPERIOR COURT;

Respondents.

No. C90-0079-VRW

ORDER

ENTERED IN CIVIL DOCKET FEB 27, 1992

---

Petitioner, a prisoner at California's New Folsom State prison, filed a petition for writ of habeas corpus. In a preliminary order dated March 26, 1991, the court found that the petition stated a claim for relief on the grounds that the state failed to afford him an evidentiary hearing regarding his competence to stand trial and that he may have been denied effective assistance of counsel. An order to show cause issued which the state answered and to which petitioner filed a traverse.

Having now considered the record, applicable law and the parties' submissions, the court concludes that there is no genuine issue of material fact and no merit to petitioner's claims.

Petitioner was convicted of murder. After clearly and unequivocally submitting himself to trial without asserting a diminished capacity defense, and after questioning by the trial court about petitioner's understanding of the consequences of his decision and his capability to make this decision and to stand trial and assist in his defense, and after the trial court's examination of petitioner and his counsel, and after being afforded a trial in which his mental state was in issue, petitioner now contends that the trial court should have suspended the trial and conducted a proceeding under Cal. Penal Code section 1368. The issue here is whether the trial court denied a request for competency hearing on the basis of fairly supported factual conclusions. The trial court correctly decided that there was no substantial evidence to warrant reasonable doubt about petitioner's competency to stand trial. Petitioner was deprived of no constitutional right.

Petitioner's claim for ineffective assistance of appellate counsel is similarly without merit. Appellate counsel need not - and manifestly should not - raise every conceivable issue. Counsel's work was objectively reasonable and there is no probability that had counsel challenged the trial court's decision to deny the competency hearing petitioner would have prevailed on appeal.

The petition is **DENIED** and order to show cause discharged.

IT IS SO ORDERED.

DATED: February 27, 1992

VAUGHN R. WALKER
United States District Judge

# APPENDIX D

**FILED APR 20 1984**
NOT TO BE PUBLISHED
IN OFFICIAL REPORTS

THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT, DIVISION THREE

THE PEOPLE OF THE
STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

ALLEN ROY TURK,

Defendant and Appellant.

A012701
(Super.Ct.No. 71151)

---

Appellant Roy Allen Turk was convicted by a jury of first degree murder. The trial court denied his new trial motion, but reduced the offense to second degree murder. Appellant contends that (1) the trial court erred when it denied his mid-trial motion for substitution of counsel; and (2) the prosecutor committed prejudicial misconduct. We affirm the judgment.

We need not recite the facts in any detail. Juanita Whitaker died as a result of severe head injuries; her body was found near appellant's truck. Appellant told at least two acquaintances that he had beaten a woman and thought he killed her.

Prior to the commencement of trial, appellant pleaded not guilty by reason of insanity. In his opening

statement, one of appellant's two attorneys[1/] told the jury that the evidence would show that what had occurred was only a manslaughter, because of appellant's mental illness and alcohol and drug use. However, on the eighth day of the trial, after the prosecution had presented its case, and after four defense witnesses had testified, appellant's attorneys informed the court that contrary to their advice, appellant did not want any psychologists to testify. Appellant now contends that what had occurred was a breakdown in the attorney-client relationship of such magnitude as to jeopardize his right to effective assistance of counsel. Appellant contends that the court failed to conduct an inquiry into the severity of the breakdown, and that it erred in denying his motion for substitution of counsel.

First, appellant's contention that the trial court did not inquire about his dissatisfaction with counsel is incorrect. The court gave appellant ample opportunity to explain his disagreements with counsel, and questioned him carefully in an attempt to determine why he was dissatisfied and what he wanted to do.

Moreover, contrary to appellant's current assertion, it was not clear what he was requesting at trial. For example, he stated at one point that his only request was to "withdrew all physicians." Later, he reiterated that the only problem he had with his attorneys was that he wanted to withdraw his "plea of N.G.I. and diminished

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1. Appellant does not dispute respondent's statement that the attorneys were privately retained, not appointed.

capacity." After additional questioning eliciting that he would rather have his attorneys withdraw than permit them to go on with the diminished capacity defense, he stated ambiguously, "And I still seek further counsel or either I will do it myself."

The court viewed appellant's motion at least in part as an untimely request to represent himself. When a defendant moves during a trial to represent himself, the court is not required to grant that motion. Rather, it must inquire into the factors underlying the request, in order to create an adequate record for possible appellate review. (People v. Joseph (1983) 34 Cal.3d 936, 944, fn. 2.) It should consider factors such as the reasons for the request, the quality of counsel's representation, the length and stage of the proceedings, and the disruption or delay which might reasonably be expected to follow the granting of such a motion. Thereafter, whether to grant or deny the motion is a matter for the trial court's discretion. (People v. Windham (1977) 19 Cal.3d 121, 128-129; cf. People v. Joseph, supra, 34 Cal.3d at pp. 943-948 [timely pretrial motion to represent self must be granted provided defendant has mental capacity to waive right to counsel with realization of probable risks and consequences].)

Here the trial court heard appellant explain that he did not like the diminished capacity defense. However, the court also assessed counsel's representation of appellant, and concluded that given the evidence, they would be subject to criticism as ineffective if they did not present a diminished capacity defense. The trial was in its eighth day, and appellant had not raised any previous objections, even when his attorney informed the jury in his opening statement of the thrust of the defense. If

what appellant wanted was to represent himself, he has failed to establish any abuse of discretion in the denial of that untimely request.

If what appellant wanted was a substitution of counsel, it is settled that a trial court has discretion to deny a motion for a continuance to secure new counsel if the motion is made during trial. (People v. Molina (1977) 74 Cal.App.3d 544, 549.) Whether a motion to relieve counsel should be granted depends on whether failure to grant the motion would substantially impair or deny the right to assistance of counsel. (People v. Joseph, supra, 34 Cal.3d at p. 944, fn. 3.) Here it is apparent that appellant's right to assistance of counsel was not impaired and appellant has failed to establish any abuse of discretion.

The cases relied on by appellant are inapposite. United States v. Williams (1979) 594 F.2d 1258 involved a motion for substitution of counsel made approximately a month before trial, not a midtrial motion such as appellant's. (Id., at pp. 1259-1261.) Similarly, in Brown v. Craven (1970) 424 F.2d 1166, defendant made four separate pretrial motions for a new attorney, and defense counsel also informed the court of his client's dissatisfaction with his representation prior to the commencement of trial. (Id., at pp. 1169-1170, fn. 3.) People v. Stankewitz (1982) 32 Cal.3d 80 is similar to this case only in that a disagreement arose between defendant and his lawyer, who believed that defendant's position was the irrational result of a mental condition. Unlike appellant's case, however, the disagreement in Stankewitz arose prior to trial; the issue was whether the trial court properly refused either to order a hearing on defendant's

competency to stand trial or to grant a request for substitution of counsel despite substantial psychiatric evidence that while defendant was unable to assist his public defender in a rational manner, he might be able to cooperate with another lawyer. (Id., at pp. 91-94.)

Appellant also contends that the prosecutor committed prejudicial misconduct during cross-examination of Drs. Bastien and Davis, and during closing argument.

First, appellant made no objection at trial to two of the closing argument statements and one of the questions which he now cites as misconduct. Without deciding whether the remarks and question constituted misconduct, we conclude that a timely objection and admonition would have cured any harm flowing therefrom; accordingly, they may not be challenged for the first time on appeal. (People v. Green (1980) 27 Cal.3d 1, 34-35.)

Appellant contends that contrary to the court's ruling that there be no mention of his having been found not guilty by reason of insanity of murder in 1972, the prosecutor referred to a statement appellant made to a psychiatrist in 1970 about cutting a devil's throat. However, the record refutes appellant's contention. The prosecutor did not violate the court's ruling; on the contrary, prior to mentioning the statement, the prosecutor consulted with the court, which expressly ruled that the statement was admissible.

Appellant argues that a portion of the prosecutor's closing argument was misconduct because it suggested that defense counsel had made up the defense (i.e., referring to psychiatric testimony as a "song and dance" or "bag of tricks"). We disagree with appellant's characterization of these remarks. While they unquestionably indicated

skepticism as to the reasonableness of the experts' conclusions about appellant's mental state, they did not suggest that defense counsel had fabricated the diminished capacity defense. (Cf. People v. Bain (1971) 5 Cal.3d 839, 845-847.)

As for the remaining cross-examination which was objected to at trial, our review of the record persuades us that appellant has exaggerated the effect of these questions. Even if we assume arguendo that each was misconduct, their cumulative effect was undoubtedly harmless beyond a reasonable doubt, and no miscarriage of justice has occurred. (See People v. Green, supra, 27 Cal.3d at p. 35; People v. Bolton (1979) 23 Cal.3d 208, 214-215; cf. People v. Hudson (1981) 126 Cal.App.3d 733, 735-742.)

Judgment is affirmed.

Scott, J.

We concur:

White, P.J.

Barry-Deal, J.

# APPENDIX E

DEPT. 11

SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF ALAMEDA

Date: May 2, 1988 Hon. GORDON BARANCO, Judge
Rhoda N Payne, Deputy Clerk
Deputy Sheriff Not Reported, Reporter

THE PEOPLE OF THE
STATE OF CALIFORNIA

Plaintiff

Counsel appearing for
Plaintiff None

vs.

ALLEN R. TURK

Counsel appearing for
Defendant None

Defendant

148

NATURE OF PROCEEDINGS: PETITION FOR WRIT OF HABEAS CORPUS ACTION No. 71151

PFN _____

CDC _____

Placed on calendar - EX PARTE

Said matter is placed on calendar this date by order of the Court.

The Court having read and considered the Petitioner's Petition for Writ of Habeas

Corpus filed on March 24, 1988, the Court hereby orders said Petition

[ ] granted. [X] denied for the following reason(s):

no prima facie showing. Writ of Error Corum Nobis denied. Petitioner has not shown the requisite "new facts" for the issuance of such writ. Further, the petition for Corum Nobis has not been brought within a reasonable time after judgment was rendered. Request for appointment of counsel may be made directly to the State Public Defender.

Copy of this minute order mailed to the following:

Allen R. Turk C-38102
P.O. Box 29
Represa, Ca. 95671

by _____
Rhoda Nishiyama-Payne, Deputy Clerk

# APPENDIX F

**FILED JUL 27, 1989**
IN THE COURT OF APPEAL OF

THE STATE OF CALIFORNIA

FOR THE

FIRST APPELLATE DISTRICT

DIVISION THREE

In re ALLEN R. TURK

on Habeas Corpus.

A044327

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BY THE COURT:

Petition for writ of habeas corpus is denied. (White, P.J., Merrill, J. and Strankman, J. participated in the decision).

Dated JUL 27 1989

Clinton White P.J.

# APPENDIX G

**FILED JANUARY 3, 1990**

ORDER DENYING WRIT
OF HABEAS CORPUS
No. SO12334

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

**IN BANK**

---

IN RE ALLEN TURK

ON

HABEAS CORPUS

---

Petition for writ of habeas corpus DENIED.

Lucas
Chief Justice

## CERTIFICATE OF SERVICE BY MAIL

ROBERT G. BORG, WARDEN,

Petitioner,

v. No._____

ALLEN R. TURK,

Respondent.

MORRIS BEATUS, a member of the Bar of the Supreme Court of the United States, states:

That his business address is 455 Golden Gate Avenue, Suite 6200, in the City and County of San Francisco, State of California; that on August 2, 1993, he served a true copy of the attached Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit in the above-entitled matter on petitioner by placing same in envelope addressed as follows:

Honorable John J. Meehan
District Attorney
County of Alameda
1225 Fallon Street, Rm 900
Oakland, Ca 94612
ATTN: Ken Burr

Allen R. Turk
C-38102
P.O. Box 29
Represa, Ca 95671

Said envelope was then sealed and deposited in the United States Mail at San Francisco, California, with the postage thereon fully prepaid.

MORRIS BEATUS
Deputy Attorney General

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

ORIGINAL
Supreme Court, U.S.
FILED
SEP 3 1993
OFFICE OF THE CLERK

93-196
NO.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1993

ORIGINAL

SEP 27 PAGE 73

ROBERT G. BORG, Warden,

Petitioner,

v.

ALLEN R. TURK,

Respondent.

Petition for Writ of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

ALLEN R. TURK
C-38102
P.O. Box 29
Represa, California 95671

REPRESENTED IN PROPRIA PERSONA

RECEIVED
SEP - 3 1993
OFFICE OF THE CLERK
SUPREME COURT, U.S.

## QUESTIONS PRESENTED

ARE THE STATE TRIAL COURT ENTITLED TO THE PRESUMPTION OF CORRECTNESS WHEN THAT COURT WOULD NOT GIVE RESOPND-ENT'S ATTORNEYS AN OPPORTUNITY TO PROVE HE WAS IN-COMPETENT TO STAND TRIAL, DESPITE COUNSEL PRESENTING OVERWHELMING EVIDENCE OF MENTAL INCOMPETENCE TO ENTITLE RESPONDENT TO A COMPETENCY HEARING AS A MATTER OF RIGHT?

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NO.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1993

ROBERT G. BORG, Warden,

Petitioner,

v.

ALLEN R. TURK,

Respondent.

Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

The respondent respectfully prays that the petition for writ of certiorari requesting review of the judgment of the United States Court of Appeals for the Ninth Circuit, filed May 5, 1993 with rehearing denied and rehearing en banc denied on June 24, 1993. The petitioner's request for review must be denied because the Ninth Circuit correctly decided the case at bench.

## OPINIONS BELOW

A copy of the unpublished opinion of the United Sates Court of Appeals for the Ninth Circuit is attached to this petition as Appendix A. A copy of the unpublished order denying rehearing and rejecting rehearing en banc is attached hereto as Appendix B. A copy of the unpublished order of the District Court denying the petition for writ of habeas corpus as Appendix C. The unpublished decision and orders of the state courts are attached as Appendix D through G.

## JURISDICTION

The judgment of the court of appeals for the Ninth Circuit was entered on May 5, 1993. Rehearing was denied and rehearing en banc rejected on June 24, 1993. The petitioner's petition for writ of certiorari followed within 90 days, pursuant to 28 U.S.C. Section 2101(c); Supreme Court Rule 13.1, 13.4. This court's jurisdiction is invoked under 28 U.S.C. Section 1254(1).

## FEDERAL STATUTES INVOLVED

Title 28, Section 2254(d) provides in pertinent part:

> In any proceeding instituted in a federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a state court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the state or an officer or agent therof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit—

(1) that the merits of the factual dispute was resolved in the State court hearing;

(2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;

(3) that the material facts were not adequately developed at the State court hearing;

(4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;

(5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;

(6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or

(7) that the applicant was otherwise denied due process of law in the State court proceeding;

(8) or unless that part of the record of the State Court proceeding in which the determination of such factual issue was made, pertinent to a determination, is produced as provided for herinafter, and the federal court on consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record: And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set forth in paragraphs numbered (1) to (7), inclusive, is shown by the applicant otherwise appears, or is

admitted by the reposndent, or unless the court concludes pursuant to the provisions of paragraph number (8) that the record in the State court proceeding, considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous.

STATEMENT OF THE CASE

On November 10, 1980, an information was filed by the District Attorney of Alameda County charging respondent with murder in violation of Cal. Pen. Code Section 187.

(See attached Opening Brief For Appellant marked Appendix H, at p. 3).

Respondent was convicted of the murder and two enhancements, the use of a deadly weapon and a prison prior term. The aggregate sentence of 19 years to life.

(See attached OBA at p. 2 marked Appendix H).

Respondent appealed to the California Court of Appeal, the convictions was affirmed in an unpublished opinion on April 20, 1984, Appendix D.

Respondent initiated State collateral proceeding on March 24, 1988, in the State trila court, arguing that the trial court erroneously denied him a competency hearing pursuant to Cal. Pen. Code Section 1368 despite the presentation of substantial evidence of mental incompetency to stand trial, and that the judge abused his discretion in failing to institute a competency hearing. The Superior court denied the habeas relief by order on May 2, 1988, finding respondent made no prima facie showing to support relief. Appendix E. Respondent's subsequent habeas corpus petitions to the State court of Appeal

and the Supreme Court (in which he also claimed that the appellate counsel was ineffective for failing to raise the competency issue on direct appeal) were summarily denied Appendix F and G.

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## REASONS FOR DENYING PETITION

### THE PETITION FOR WRIT OF CERTIORARI FAILS TO MEET THE SUPREME COURT RULE 10 STANDARD OF PRESENTING SPECIAL OR IMPORTANT REASONS FOR REVIEW ON WRIT OF CERTIORARI

The petition for writ of certiorari does not meet the standard of Supreme Court Rule 10. The Rule provides, in pertinent part:

> A review on writ of certiorari is not a matter of right, but judicial discretion. A petition for a writ of certiorari will be granted only when there are special and important reasons therefor.

Rule 10 lists several reasons that might satisfy this high standard. Petitioner does not even arguably fit into any of the provisions of the Sub-sections of Rule 10 because thrial judge would not give respondent's attorneys an opportunity to prove he was incompetent to stand trial That alone was a deprivation of respondent's constitutional rights to due process of law under the due process clause of the Fourteenth Amendment to United States Constitution.

In the instant case, the trial judge transgressed 28 U.S.C. section 2254(d) subsections (1), (2), (3), (6), and (7):

(1) The trial court never resolved the factual dispute before denying the two Penal Code section 1368 motions, He used evidence from two State doctors to guide him in making a determination on the motions but he refued to accept evidenc from the third doctor who was prepared to to testify in support

of the 1368 motions. See OBA at pp. 2, 4-7 attached hereto Appendix H.

(2) The factfing procedure the court employed was not in accordance with the language under 28 U.S.C. section 2254(d) number two.

(3) The facts was adequate to create a competency hearing but the judge would not permit defense to present that crucial evidence, That transgressed this statute.

(6) The State court denied reapondent his rights under People v. Pennington, 66 Cal. 2d 508, at p. (drawing on Pate v. Robinson, 383 U.S. 375), In Pennington the California Supreme Court noted that the prosecution also presented substantial evidence that defendant was sane; however, once it is determined that the defendant's showing was substantial, it is immaterial that the prosecuton's evidence may seem more persausive. THE CONFLICT CAN ONLY BE RESOLVED upon a special trial before thejudge or jury, if a jury is requested. (Pen. Code Section 1368.) Id, at p. 819. Respondent was deprived of a substantial right when the judge failed to follow that procedure.

(7) 28 U.S.C. 2254(d) subsection 7 states that the applicant was otherwise denied due process of law in State court proceeding. Respondent was denied due process in State court proceeding when the court would not give he attorneys an opportunity to prove he was incompetent to stand trial.

The Ninth Circuit's decision must stand they only used a routine application of existing law. The Ninth Circuit cited recent case law (Hernandez v. Ylst, 930 F. 2d 714 (9th Cir. 1991) that relies upon long established prinicles of law from Drope v. Missouri, 420 U.S. 162 (1975) and Pate v. Robinson, 383 U.S. 375 (1966)

As respondent argued in his "Opening Brief for Appellant" that the trial court convicted him in an unduly hurried trial without a fair opportunity to persent evidence that he was incompetent to stand trial to support two Cal.

Pen. Code Section 1368 motions. (See Appendix H pp. 9-16, and the Exhibits attached thereto).

IN THE EVENT IF THE SUPREME COURT GRANT REVIEW RESPONDENT REQUEST COUNSEL TO REPRESENT HIM

Respondent has acted without legal counsel throughout the Federal habeas proceedings, so he cannot be sure that the legal issues have been framed correctly. He has contacted the LAW OFFICES OF NORTON TOOBY, 516 52nd Street, Oakland, California 94609 (510) 601-1300 Fax (510) 601-79-76, Mr. Tooby have agreed to represent him if the this court appoint him.

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CONCLUSION

Petitioner's argument is without merit and does not warrant review of the decision rendered by the United States Court of Appeals for the Ninth Circuit in this case.

For the reasons stated herein this Honorable Court must affirm the decision of the Ninth Circuit.

Dated: August 31, 1993

Respectfully submitted,

ALLEN R. TURK
C-38102
P.O. Box 29
Represa, California 95671

PRESENTED IN PROPRIA PERSONA

UNITED STATES COURT OF APPEALS

NINTH CIRCUIT

ALLEN R. TURK,

Petitioner and Appellant,

vs.

ALAMEDA COUNTY; ROBERT BORG, Warden, California, Folsom State Prison,

Defendant and Appellees.

NO. 92-15535

Lower Court Docket Number: CV-90-00079-VRW

On Appeal From An Order Denying Petition For Writ Of Habeas Corpus In The United States District Court For The Northern District Of California

OPENING BRIEF FOR APPELLANT

REPRESENTED IN PROPRIA PERSONA

ALLEN R. TURK
C-38102
P.O. Box 29
Represa, California 95671

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ALLEN R. TURK, C-38102
P.O. Box 29
Represa, CA 95671

Plaintiff and Appellant

UNITED STATES COURT OF APPELAS

NINTH CIRCUIT

ALLEN R. TURK,

Plaintiff and Appellant;

v.

ALAMEDA COUNTY; Robert Borg, Warden, California, Folsom State Prison,

Defendants and Appellees.

No. 92-15535
Lower Court Docket Number:
CV-90-00079 VRW

OPENING BRIEF FOR APPELLANT

I

SUBJECT MATTER

1. Appellant, Allen R. Turk, was charged by way of information by the District Attorney of the County of Alameda, State of California.

2. Appellant, Allen R. Turk, in propria persona, a state prisoner, hereby appeals to this court the decision of the United States District Court for the Northern District of California, of denying his petition for writ of habeas corpus directed to the Warden of Folsom State Prison in the County of Sacramento, Mr. Robert Borg; and the District Attorney of Alameda County, commanding them to release appellant from confinement, to the extent that said confinement

is illegal in violation of the Constitution and the [illegible]s of the United States, and this State of California.

3. Appellant appeals to this court for relief declaring that appeallant's Constitutional rights to 6th and 14th Amendment to the United States Constitution.

The Amendments was violated when:

A. The trial judge committed prejudicial error when denied appellant's two California Penal Code Section 1368 motions to suspend criminal proceedings and institute a mental competency hearing to determine whether or not appellant was mentally competent to stand trial;

B. Appellant presented substantial evidence of present mental incompetence to trigger a competency hearing under 1368 or an evidentiary competency hearing, when Mr. Murray stated his legal reason for making the 1368 motion that a doctor who had examine him that morning and the previous night told him that appellant was psychotic and was not competent to stand trial;

C. The trial judge committed p[illegible] error when he used medical reports from two alienist doctors as a guide to help him determine whether or not he should institute a mental competency hearing. The two doctors only spent a short period of time with appellant less than twenty minutes (20) as oppose to the other doctor, Dr. Sheila Bastien who had spent over sixteen (16) hours with the appellant administering psychological test, and other examinations of his mental state, The judge would not use her reports nor permit her to take the witness stand to offer psychiatric evidence in support of the 1368 motions. (2 RT 472-47

D. Appellant asserts that despite the trial judge denying his 1368 motions he presented the requisite substantial evidence of present incompetency which entitle him to a full competency hearing or an evidentiary hearing as a matter o right and a matter of law under the 14th Amendemnt to the United States Constitution.

E. Appellant's court appointed appellate counsel failed to render effective assistance of counsel on direct appeal.

4. Appellant, Allen R. Turk, is a State Prisoner currently incarcerated at New Folsom State Prison in Sacramento County, California;

5. Mr. Robert Borg, is the duly appointed and, acting Warden of New Folsom State Prison in Sacramento County, California., and has physical custody of appellant;

6. Mr. James Gomez, is the duly appointed and, acting director of the California Department of Corrections and is responsible for the operation of the department, including the operation of New Folsom State Prison in Sacramento County, California.

II

STATEMENT OF FACT

On October 29, 1980, appellant was held to answer for murder (Penal Code Section 187) following a preliminary hearing in the Alameda County Municipal Court (James Stanford White, Judge)

(CT 72.)

On November 10, 1980, an information was filed alleging murder (Penal Code Section 187); with use of a deadly weapon (Penal Code Section 12022, subd. (b)) and infliction of great bodily injury (Penal Code Section 1203. C75). The information further alleged appellant was on parole at the of the offense (Penal Code Section 1203. C85), and that he suffered two prior convictions on September 20, 1976 (Penal Code Section 667.5 subd.(a))

(CT 77-78.)

On November 12, 1980, appellant denied the deadly weapon, great bodily injury and parole clause allegations. He neither admitted nor denied the prior prison terms.

(CT 79.)

On February 11, 1981, the court appointed a psychotherapist to examine appellant prusuant to Evidence Code Sections 730 and 1017.
(CT 79.)

On August 12, 1981, appellant entered a not guilty by reason of insanity plea to the murder charge, and admitted the prior prison terms and the parole clause allegations. The Court struck the great bodily injury allegation, and appointed a psychiatrist to examine appellant pursuant to Cal. Pen. Code Section 1026. The matter was continued to August 13, 1981.
(CT 79.)

On August 25, 1981, appellant's defense counsel move the court to suspend criminal proceedings and institute a competency hearing under Cal. Pen. Code Section 1368. Appellant presented substantial evidence of present mental incompetency to stand trial. Defense counsel informed the court of appellant's mental breakdown and was unable to cooperate with cousel in the defense of his case because he was operating under a delusional system. The court denied the motion.
(2 RT 267,271.)

On August 26, 1981, the following day, counsel moved the court the second time to suspend criminal proceedings and institute a competency hearing to determine present competency. Appellant presented substantial evidence of present mental incompentency to stand trial that substantial evidence consisted of in pertinent part a statement to the court by defense counsel Mr. Murray when he informed the court of Dr. Sheila Bastien, a licensed psychologist had communicated to him about appellant's present mental state by stating the the following:

> THE COURT: You are asking the court again to suspend criminal proceedings?

MR. MURRAY: Yes, your honor. Dr. Sheila Bastien, who is a licensed psychologist, saw Mr. Turk on saturday and again this morning and she indicated to me after her interview with Mr. Turk—

THE COURT: I can't hear you.

MR. MURRAY: She indicated to me after her interview and evaluation of Mr. Turk on saturday that she considered him psychotic at the time she was interviewing him. She saw him again this morning. She says the same thing. I make the motion under 1368 because I don,t believe Mr. Turk at this point is capable of cooperating with counsel. He does not know the difference between legal guilt and moral or spiritual guilt. And, therefore, not knowing that distinction, he refuses to allow us to proceed to present psychological evidence in his defense. And he also will not accede to our advice that he testify. He says he wants to withdraw his plea of not guilty by reason of insanity; wants to withdraw his defenses under diminished capacity, wants to proceed without those defenses. As a lawyer, I can't competently represent the man, given his state of mind where he fails to know the difference between legal guilt and spiritual guilt. Therefore, I consider him a 1368, your honor. And that is why I make the motion. And Dr. Bastien is here if you wish to ask her any questions.

(2 RT 278-279.)

At any rate, the trial judge would not call Dr. Bastien to the witness stand to testify in support of counsel's statement regarding appellants' present mental state, and by not permitting the defense witness to testify deprived the appellant of a substantial right to present an expert witness in his defense. The judge denied the motion.

(2 RT 294.)

The psychiatric evidence Dr. Bastien wanted to present to the court were that appellant was having auditory and visual hallucinations at the present time caused by mental illness. He was hearing voices and seeing things that

was not so. She discovered this information during an interview with him at the County jail, she could not disclose this information to the court during the period the 1368 motions was being argued because the judge would not permit her to testify until he had denied the motions.

Dr. Bastien is called to the witness stand and questioned about appellant's mental state regarding having delusions and hallucinations, the following interchanges were made:

> Q. What about their ability to use language to accurately describe what they see?
>
> THE WITNESS Dr. Bastien: A. When a person has a delusion or hallucination, not only can they not see things accurately but they misinterpret them.
>
> Q. Misinterpret in what sense, seeing an orange thinking it is an apple or is it more subtle thing than that?
>
> A. It is more subtle thing than that.
>
> Q. Give us an example or concepts or these descripions in relation to Mr. Turk's brain function or mind function.
>
> A. All right in terms of perceptions when I interviewed Mr. Turk, he said "the Lord showed him." I saked how—I asked how would he know who was good because he was talking about people. And he said, "I pray to the Lord to show me who is good around me." And I asked him how would he know that and he pointed and said, "the Lord shows me those little people with big mouths right here." And he pointed to the right shoulder, and said, they were bitting." I questioned him on this and he said that actually those people "ones that laugh and talk in my face are the no good people with the big red mouths." And another point in the interview he said that through some supernatural unexplained way to him he knew what people on the streets were saying about him right now, both males and females.

(2 RT 492-493, and 495.)

The trial judge then questions the doctor about the difference between a delusion and a hallucination and she stated the following to the court:

THE COURT: What is the difference between a delusion and hallucination?

THE WITWNESS Dr. Bastien: A. A delusion is when you have a thought that is not so. A hallucination— There are two kinds— well mainly kinds that we talk about. One is an auditory hallucination where you hear things; look; you hear someone talking there. A visual hallucination, which he also had, is when you see things that aren't there. He also told me upon questioning that he saw flashing lights, which suggest to me more organic brain syndrome than a paranoia. That particular kind of delusion is more appropriate for organic brain syndrome for someone who has had a damaged brian in some way.

(2 RT 494-495.)

In addition to that medical records from (C.D.M.H.) California Department of Mental Hygiene revealed that the appellant had been diagnosed as a paranoid schizophrenia by over 40 doctors, and that he had history of bizarre delusions. The court was informed of it by Dr. Bastien. Those records further revealed that appellant thinks he is an agent of God. (R.T. ) Dr. Bastien also informed the court that he had been admitted to State Mental Institutions fifteen (15) separate times with over five years of total commitment time.(4 RT 211-212)

Dr. Bastien was questioned about the 40 doctors diagnosis and she indicated to the court that he was consistently described a psychotic 99% of the time (quoting) records from C.D.M.H., and that she agreed with those reports (4 RT 211.)

During trial appellant was in pain and was taking pain medication because he had been viciously assaulted by four to five jail inmates within the County jail, He sustained both external and internal head injuries. The matter was briefly discussed in chambers on August 12, 1981, and the trial judge issued a court order to the sheriff's dept. to carry appellant to the hospital to have stitches removed from his face and head, but before the order were issued the following discussion were held in that regard:

DEFENSE COUNSEL, MR. MURRAY: I wanted— your honor, the only thing I was going to ask is it would be possible, whether we need to help the court do this or not, but he's going to have stitches out of his face and friday would be a good day to do that. Basically what should I do about that?

PROSECUTOR, MR. BURR: Perhaps the could have a minute order issued having defendant transported to the hospital on friday so that he could have the necessary medical attention.

THE COURT: Who did the eye for you? Who put the stitches in it?

DEFENDANT: Female doctor. I forgot her name.

THE COURT: What hospital?

DEFENDANT: Highland.

THE COURT: When are they ready to take your stitches out?

DEFENDANT: Friday.

THE COURT: He should be taken friday to the hospital to get the stitches out. That is an order of the court. All right.

(1 RT 12.)

On September 16, 1981, the jury returned a verdict of violation of section 187 of the Penal Code murder in the first degree.

(CT 37.)

On October 7, 1981, appellant's motion for a new trial argued and submitted. The motion is denied.

Appellant's motion to reduce sentence is argued and submitted. The motion was granted.

(CT 44.)

On November 3, 1981, appellant is sentenced to state prison for a total term of nineteen years to life.

(CT 45.)

## ARGUMENT

### I

### APPELLANT WAS DENIED DUE PROCESS AND RIGHT TO FAIR TRIAL WHEN THE TRIAL JUDGE DENIED HIS TWO CAL. PEN. CODE SECTION 1368 MOTIONS TO SUSPEND CRIMINAL PROCEEDINGS AND INSTUTUTE A COMPETENCY HEARING PURSUANT TO PATE V. ROBINSON, 383 U.S. 375, AND TILLERY V. EYMAN, 492 F. 2d 1056 .....

### APPELLANT PRESENTED SUBSTANTIAL EVIDENCE OF MENTAL INCOMPETENCE TO STAND TRIAL WHEN THE CAL. PEN. SECTION 1368 MOTIONS WERE MADE

Appellant contends that insofar as the procedure approved in the case of People v. Merkouris, 52 Cal. 2d 672, which permits a trial judge to resolve conflicting evidence against a doubt of present insanity, it is unconstitutional, where, as in the instant case, where appellant has come forward with substantial evidence of incompetency to stand trial.

In the case at bench, the trial court convicted appellant in an unduly hurried trial without a fair opportunity to present expert psychiatric evidence from defense witness in support of the Cal. Pen. Code Section 1368 motions to suspend criminal proceedings and institute a competency hearing. People v. Humphrey, 45 Cal. 3d 32, has similarities to the case at bench, in Humphrey, medical reports from two doctors were submitted to the trial court thus giving their professional opinion about his mental condition, in the report it was determined that he was a paranoid schizophrenic "dangerous to his wife, his probation officer, and himself....[who] require hospitalization where he can be contained...." Dr. Jens noted appellant's extensive history of institutionalization, including treatment at the Colorado State Hospital, 3 courses of treatment at Metropolitan State Hospital, and 10 to 12 admissions to treatment at Long Beach Veterans Administration Hospital. Id., at p. 35. Appellant herein had been diagnosed as a paranoid schizophrenia by over 40 doctors. (4 RT 159, 211-212.)

People v. Pennington, 66 Cal. 2d 508, the United States Supreme Court decision in Pate v. Robinson, supra, 383 U.S. 375, compels us to revise our interpretation of section 1368 of the Penal Code so that it complies with the requirements of due process of law. (United States Constitution Amendment 14th.)

In Pate v. Robinson, the court reviewed on collateral attack, that is on habeas corpus, an Illinois murder conviction [citation omitted], held that defendant Robinson had presented at his trial sufficient evidence of mental incompetence to entitle him to a hearing on present sanity as a matter of right under the due process clause. That evidence consisted of testimony by three of Robinson's close relatives and one family friend relating various acts of Robinson several years before the trial which suggested mental illness. Two of the witnesses, Robinson's mother and aunt, stated that in their opinion he was insane at the time of trial. His grandfather and the family friend testified that they considered him to be insane at unpredictable periods of time. It was brought out that he had spent several weeks in a mental hospital some eight years before trial. But he was recovered from his illness when discharged and about two years later was adjudged sane in restoration proceedings. It was stipulated at Robinson's murder trial that a psychiatrist who had examined Robinson had found him sufficiently sane to stand trial. In affirming Robinson's conviction, the Supreme Court of Illinois had held that the evidence did not "raise a bona fide doubt as to [Robinson's] present sanity. [citation omitted]. It was noted that the defense witnesses had based their conclusions that he was insane or insane at times primarily on incidents occurring years before trial. Furthermore, the court noted, that the record disclosed several instances during trial where Robinson displayed his ability to assist in his defense by making lucid and cogent legal arguments to the trial judge, as appellant did in the case at bench.

The United States Supreme Court held that neither the stipulation that a psychiatrist had found Robinson sufficiently sane to stand trial nor Robinson's

lucid comments during the trial offered a "justification for ignoring the uncontradicted testimony of Robinson's history of pronounced irrational behavior." (Pate v. Robinson, supra, 383 U.S. at pp. 385-386, 15 L. Ed. 2d at p. 822.) "We believe," states the court's holding, that the evidence introduced on Robinson's behalf entitled him to a hearing on this issue. "The court's failure to make such inquiry thus deprived Robinson of his constitutional right to a fair trial." (Id. at p. 385, 15 L. Ed. 2d at p. 822.)

Pate v. Robinson, stands for proposition that an accused has a constitutional right to a hearing on present sanity if he comes forward with substantial evidence that he is incapable because of mental illness, of understanding the nature of the proceedings against him or of assisting in his defense. Once such substantial evidence appears, a doubt as to the sanity of the accused exist, no matter how persuasive other evidence-testimony of the prosecution witnesses or the court's own observations of the accused may be to the contrary.

When the evidence casting doubt on an accused's present sanity is less than substantial, People v. Merkouris, supra, 52 Cal. 672, 678-679, correctly states the rules for application of section 1368 of the Penal Code. Whether to order a present sanity hearing is for the discretion of the trial judge, and only where a doubt as to sanity may said to appear as a matter of law or where there is an abuse of discretion may the trial judge's determination be disturbed on appeal. But when defendant has come forward with substantial evidence of present mental incompetence, he is entitled to a section 1368 hearing as a matter of right under Pate v. Robinson, supra, 383 U.S. 375. The judge then has no discretion to exercise. Insofar as People v. Merkouris, supra, 52 Cal. 2d 672, and People v. Lindsey, supra, 56 Cal. 2d 324, suggest that the judge, because he personally has no doubt as to the accused's sanity, may deny a section 1368 hearing despite substantial evidence of present insanity, they

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are overruled. People v. Pennington, 66 Cal. 2n 518-519.
In Pennington, the court noted that the prosecutor also presented substantial evidence that the defendant was sane; however, once it is determined that the prosecution's evidence may seem more persuasive. The conflict can only be resolved upon a special trial before the judge or jury, if a jury is requested. [Penal Code section 1368.] The diagnosis of Dr. Sussman, which he related on the stand while the judge was taking evidence to guide him in determining if he entertained a doubt of the defendant's present sanity, was by itself, substantial evidence which compelled the court to order a section 1368 hearing. If a psychiatrist or qualified psychologist [citation omitted], who has had sufficient opportunity to examine the accused states under oath with particularity that in his/her opinion the accused is because of mental illness, incapable of understanding the purpose or the nature of the criminal proceedings [illegible] against him or is incapable of assisting in his defense or cooperat[illegible] counsel, the substantial evidence test is satisfied," Mr. Susman so testified.

In the case at bench, the appellant was denied a substantial right when trial judge would not permit him to present an expert defense witness the Dr. Sheila Bastien, a licensed psychnlogist, duly qualified in that capacity. She spent over sixteen (16) hours with appellant administering various psychological test and examinations of his mental condition (2 RT 473-474).

On August 25, 1981, Mr. Comiskey, made the first Pen. Code section 1368 motion to suspend criminal proceedings and institute a competency hearing. He informed the court of his legal basis for the motion that the appellant was operating under a delusional system caused by mental illness, the trial judge denied the motion (2 RT 267-271.) (Emphasis added), The prosecutor and defense counsel had complete copies of appellant's medical records from (C.D.M.H.) California Department of Mental Hygiene, The trial judge had first hand knowle dge of appellant's long history of mental illness, because he was the first

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOR THE

FIRST APPELLATE DISTRICT

DIVISION THREE

FILED

JUL 27 1989

Court of Appeal - First App. Dist.
RON D. BARROW

By [redacted] Deputy

In re ALLEN R. TURK

on Habeas Corpus.

A044327

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BY THE COURT:

Petition for writ of habeas corpus is denied. (White, P.J., Merrill, J. and Strankman, J. participated in the decision).

Dated JUL 27 1989

P.J

No. A044327

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

# IN BANK

SUPREME COURT
FILED

JUN 14 1989

Robert Wandruff Clerk

DEPUTY

IN RE TURK

The above entitled matter, now pending in the Court of Appeal, First Appellate District, is transferred from Division Four to Division Three.

I, Robert F. Wandruff, Clerk of the Supreme Court of the State of California, do hereby certify that the preceding is a true copy of an order of this Court, as shown by the records of my office.

Witness my hand and the seal of the Court this

15 day of JUN 1989 A.D. 19 —

By _____ Clerk

Deputy Clerk

LUCAS

Chief Justice

ORDER DENYING WRIT OF HABEAS CORPUS

No. S012334

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

SUPREME COURT
FILED
JAN 3 1990
ROBERT WANDRUFF CLERK
DEPUTY

IN RE ALLEN TURK

ON

HABEAS CORPUS

Petition for writ of habeas corpus DENIED.

Lucas
Chief Justice

99260/0

United States District Court
For the Northern District of California

FILED

MAR 26 7 34 PM '91

RICHARD W. WIEKING
U.S. DISTRICT COURT
NO. DIST. OF CA

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

ALLEN R. TURK,

Petitioner,

v.

ROBERT BORG, Warden, Folsom State Prison; PEOPLE OF THE STATE OF CALIFORNIA; ALAMEDA COUNTY SUPERIOR COURT;

Respondents.

No. C-90-0079-VRW

ORDER TO SHOW CAUSE

ENTERED IN CIVIL DOCKET MAR 27 1991, 19

Petitioner, proceeding pro se and in forma pauperis, seeks a writ of habeas corpus pursuant to 28 U.S.C. § 2254 on the grounds of incompetence to stand trial and ineffective assistance of appellate counsel. Venue is proper in this district because petitioner was convicted in Alameda County. 28 U.S.C. § 2241(d). Petitioner has presented his claims to the California Court of Appeal and California Supreme Court on writ of habeas corpus and thus has exhausted his state court remedies.

Petitioner is currently incarcerated at New Folsom State Prison. In 1981, he was convicted of murder and use of a deadly weapon and received a sentence of nineteen (19) years. He alleges

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PARTIES OF RECORD

that a psychologist examined him prior to trial and determined that he was psychotic at that time. Nevertheless, the trial court refused to grant his motion for a hearing regarding his competence to stand trial. He further alleges that his appellate counsel did not raise this claim at the initial appeal, and thus that he was denied effective assistance of appellate counsel.

State court determinations of competency are entitled to a presumption of correctness in a federal habeas proceeding. Evans v. Raines, 800 F.2d 884, 887 (9th Cir. 1986). However, a petitioner is entitled to an evidentiary hearing on the issue of competency if he presents sufficient facts to create a real and substantial doubt as to his competency. Boag v. Raines, 769 F.2d 1341, 1343 (9th Cir. 1985), cert. denied, 474 U.S. 1085 (1986). Petitioner's allegation that he was diagnosed as psychotic raises a doubt about his competency and is sufficient to state a colorable claim.

Petitioner has a right to effective assistance of counsel on his first appeal as of right. Pennsylvania v. Finley, 481 U.S. 551, 554 (1987). Under Ninth Circuit law, petitioner "must show that counsel's advise fell below an objective standard of reasonableness . . . and that there is a reasonable probability that, but for counsel's unprofessional errors, [petitioner] would have prevailed on appeal." Miller v. Keeney, 882 F.2d 1428, 1434 (9th Cir. 1989) (citations omitted). Petitioner's allegation that his attorney on appeal failed to challenge the trial court's denial of a competency hearing is a colorable claim.



United States District Court
For the Northern District of California

Accordingly, IT IS ORDERED that:

1. Petitioner's request to proceed in forma pauperis is granted.

2. Within three (3) days of the date of this order, respondents shall serve on petitioner and file with this court an answer showing cause why a writ of habeas corpus should not issue.

3. The Clerk of the Court shall immediately serve by certified mail a copy of the petition and this order on respondents and on the Attorney General of California.

4. The Clerk of the Court shall mail a copy of this order to petitioner by certified mail, return receipt requested.

DATED: March 25, 1991

VAUGHN R. WALKER
United States District Judge

United States District Court
For the Northern District of California

STATE OF CA... )
COUNTY OF SACRAMENTO )

VERIFICATION

( C.C.P. sec. 446 & 2015.5; 28 U.S.C. sec.1746)

I, ALLEN R. TURK [Name of Prisoner] declare under penalty of perjury that: I am the Respondent in the above-entitled action; I have read the foregoing documents and know the contents thereof; and the same is true of my own knowledge, except as to matters stated therein upon information and belief, and as to those matters, I believe them to be true.

Executed this 1 day of Sept., 1993, at California Dtate Prison-Sacramento, Represa, California 95671.

[Signature] Allen R Turk
DECLARANT/PRISONER

* * * * * * * * * * * * * * * * * *

PROOF OF SERVICE BY MAIL

(C.C.P. sec. 1013a & 2015.5; 28 U.S.C. sec.1746)

I, ALLEN R. TURK, am a resident of California State Prison Sacramento, County of Sacramento, State of California; I am over the age of Eighteen (18) years and am a party to the above-entitled action. My State Prison address is: C-38102, P.O. Box 29, Represa, Ca. 95671.

On Sept 1, 1993, I served the foregoing :

BRIEF IN OPPOSITION TO PETITIONER'S PETITION FOR WRIT OF CERTIORARI IN THE U.S. SUPREME COURT (Ninth Circuit's Decision) NO. 92-15535 DC NO. CVv90-00079 VRW

[Set forth exact title of document(s) served]

on the party(s) herein by placing a true copy(s) thereof, enclosed in a sealed envelope(s), with postage thereon fully prepaided, in the United States mail, in a deposit box so provided at California State Prison-Sacramento, Represa, California 95671, addressed as follows:

Attorney General's Office
455 Golden Gate Ave., #6200
San Francisco Ca 94102

District Attorney's Office
County of Alameda
1225 Fallon Street, Rm. 900
Oakland, Ca 94612

There is delivery service by United States mail at the place so addressed, and/or there is regular communication by mail between the place of mailing and the so addressed. I declare under penalty of perjury that the foregoing is true and correct.

DATED: Sept 1..., 1993, Allen R Turk
DECLARANT/PRISONER

.9926070

.9926070

judge who committed him to Napa State Hospital, from San Francisco General Hospital in 1964 [sic], the court also had a copy of the medical records showing that he had had fifteen separate commitments, and five years of total commitment time in mental hospitals. (RT 211-121).

The next day the second motion under 1368 was filed by Mr. Murray, and he stated his legal basis for the motion (RT 278-279), He also tells the trial judge that the doctor had told him that appellant was psychotic at the present time, and that he did not believe was capable of cooperating with counsel in his defense, and in addition to that he tells the court that the doctor was present in the court ready to respond to the statement that he had made with respect to appellant's mental condition of being incompetentto stand trial. The judge denied the motion. (RT 279, 294).

In People v. Pennington, supra, at pp. 520-521 which illustrates the distinction between a coplete hearing ti decide if an accused is competent to stand trial, and special proceedings conducted by a judge to determine whether he should declare that a doubt of the accused'd presnet sanity exists is well reconized in this state. [citation omitted], The decision of the United States Supreme Court in Pate v. Robinson, supra, demonstrates that the type of "hearing" which due process requires when the accused has come forward with substantial-evidence of present insanity has not been accordedthe accused when the judge merely takes evidence to guide him in determining if he should declare the existence of a "doubt." A "hearing" is generally understood to be a proceeding where evidence is taken to the end of determining an issue of fact and decision made on the basis of that evidence. [citation omitted], Such a full hearing on the present sanity issue, manifestly the type of hearing the United States Supreme Court was referring to, is provided for by 1368 of the Penal Code which was erroneously denied to appellant Turk in the case at bench.

In Tillery v. Eyman, 492 F. 2d 1056 at pp. 1058-1059, the court explained that Pate requires an evidentiary competency hearing "any time" there is such substantial evidence that the defendant may be mentally incompetent to stand trial. Moore v. United States, 464 F. 2d 663 (9th Cir. 1972). We there stated the court's holdings: "Substantial Evidence is a term of art. Evidence encompasses all information properly before the court, whether it is in the form of testimony of exhibits formally admitted or it is in the form of medical reports or other kinds of reports that have been filed with the court. Evidence is substantial if it raise a reasonable doubt the defendant's competence to stand trial. Once there is such evidence from any source, there is a doubt that cannot be dispelled by resort to conflicting evidence. The function of the trial court in applying Pate's substantial-evidence test is not to determine the ultimate issue: is the defendant competent to stand trial? It[s] sole function is to decide whether there is any evidence which, assuming its truth raises a reasonable doubt the defendant's competency. At any time that such evidence appears, the trial court sua sponte must order an evidentiary hearing on the competence issue. It is only after the evidentiary hearing, applying the usual rules appropriate to trial, that the court decides the issue of competency of the defendant to stand trial." Moore v. United States, supra, at p. 666; see Rhay v. White, 385 F. 883 (9th Cir. 1967).

In the case at bench, the trial judge used medical reports from two alienist doctors who had briefly examined appellant at the County jail pursuant to Cal. Pen. Code Section 1026. But the judge would not permit appellant to present an expert witness who had spent over sixteen (16) hours with appellant (RT 473-474) administering various psychological test and examinations of his mental state pursuant to diminished capacity defense. The trial judge committed prejudicial error when he would not permit appellant to present the expert witness (Dr. Sheila Bastien) in support of the 1368 motions, Thus, the error

deprived him of a substantial right which as a result deprived appellant of his right to a fair trial. People v. Tomas, 74 Cal. App. 3d 75, Defendant WAS convicted on two counts of assault by means of force likely to produce great bodily injury injury (Penal Code Section 245, subd. (b)) on peace officers engaged in the performance of their duties. After defendant had been found guilty by the court, a psychiatrist was appointed to examine him and make a recommendation to the probation department. The report concluded that defendant was probably legally sane at the time of the commission of the offense charged, but was presently unable to unstand the nature of the oroceedings taken against him and could not cooperate with counsel in a rational manner in presenting a defense. Thereafter, the trail court sentenced defendant to prison for the term prescribed by law.

The court held that: "[S]ection 1368 requires him [the trial judge] to consider all evidence of present insanity presented to him prior to sentencing and to order a hearing on his own motion if the evidence raises a doubt of the accused's competence to stand trial." It was substantial evidence of defendant's competence to stand trial presented to the trial court in form of Dr. Deering's reports, Dr. Deering did not testify under oath. However, his report was submitted to the court under an order appointing him to examine the defendant and to file his report to the court. Similar reports were considered in determining whether substantial evidence of incompetence in People v. Laudermilk, 76 Cal. 2d 272, 286 [Cal. Rptr. 664, 431 P. 2d 228], (finding evidence substantial because of the medical reports, not because of lack of testimony under oath). In Moore v. United States, (9th Cir. 1972) 464 F. 2d 663, at p. 666, the court specifically referred to "medical reports or other kinds of reports that have been filed with the court" as evidence raising a doubt as to the defendant's competence.

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In the case at bench, the trial judge would not permit the appellant to present an expert defense witness who was prepared to testify thus offering psychiatric evidence of incompetence corroborating the legal basis of the two defense attorney who initiated the two 1368 motions, But, however, that crucial evidence was brought out in court after the judge denied the second motion.

Applying the rules compelled by Pate v. Roboinson, supra, to the facts of the case at bench, it appears beyond the possibility of dispute that the appellant presented the requisite substantial evidence of incompetence to stand trial.

ARGUMENT

II

APPELLANT WAS NOT ACCORDED EFFECTIVE ASSISTANCE OF APPELLATE COUNSEL ON DIRECT APPEAL IN STATE COURT

Appellant contends that this his court appointed appellate counsel was ineffective for not adequately researching hid case on direct appeal because proper research of the trial court denying appellant's two two Cal. Pen Code Section 1368 motions to suspend criminal proceedings and institute a competence hearing or an evidentiary competency hearing to resolve the incompetence issue Thus deprived the appellant of effective assistance of counsel on direct appeal were violative of the 6th Amendment to the United States Constitution.

Appellant contends that exists a reasonable probability that the result of appeal would been different had counsel properly researched and raisaed the 1368 issue, his omission was prejudicial, and appellant believes that he has met the requisite showing to satisfy the test required in Strickland v. Washington, 466 U. S. 668, L. Ed 2d 674.

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## CONCLUSION

WHEREFORE appellant asks that this court reverse this case in its entirety, and grant any other relief the court deems appropriate and just.

Dated: [illegible], 1992

Respectfully submitted,

ALLEN TURK
Plaintiff and Appellant
In pro per

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VERIFICATION

STATE OF CALIFORNIA, )
) ss:
COUNTY OF SACRAMENTO )

(C.C.P. sec. 446 & 2015.5; U.S.C. sec. 1746)

I, ALLEN R. TURK [Name of Prisoner], declare under penalty of perjury that: I am the Plaintiff & Appellant in the above-entitled action; I have read the foregoing documents and know the contents thereof; and the same is true of my own knowledge, except as to matters stated therein upon information and belief, and as to those matters, I believe they are true.

Executed this 9th day of JULY, 1992, at CSP - Sacramento County State Prison, P.O. Box 29, Represa, California 95671.

[Signature] Allen R. Turk
DECLARANT/PRISONER

* * * * * * * * *

PROOF OF SERVICE BY MAIL

(C.C.P. sec. 1013a & 2015.5; 28 U.S.C. sec. 1746)

I, ALLEN R. TURK, am a resident of CSP- Sacramento County State Prison, in the County of Sacramento, State of California; I am over the age of eighteen (18) years and am a party to the above-entitled action. My State Prison address is: Post Office Box 29, Represa CA 95671.

On JULY 9th, 1992, I served the foregoing:

(1) OPENING BRIEF FOR APPELLANT, (2) EXCERPTS OF RECORDS

Case No. 92-15535, Lower Court Docket Number CV-90-00079 VRW

[Set forth exact title of documents(s) served]

on the party(s) herein by placing a true copy(s) thereof, enclosed in sealed envelope(s), with postage thereon fully paid, in the United States mail, in a deposit box so provided at CSP - Sacramento Sounty State Prison, P.O. Box 29, Represa, CA 95671.

LAURENCE K. SULLIVAN
Deputy Atty. General
455 Golden Gate Ave., Room 6200
San Feancisco, CA 94102

OFFICE OF THE CLERK
United States Court of Appeals
Ninth Circuit
P.O. Box 193939
121 Spear Street
San Francisco, CA 94119-3939

There is a delivery service by United States mail at the place so addressed, and/or there is regular communication by mail between the place of mailing and the place so addresses. I declare under penalty of perjury that the foregoing is true and correct.

DATE: JULY 9, 1992. Allen R. Turk
DECLARANT/PRISONER

INDEX CONTAINING TRIAL TRANSCRIPT (EXCREPTS)
PAGES MENTIONED IN THE BRIEF

"EXCERPTS"

COUNTY OF ALAMEDA
COURTHOUSE — 1225 FALLON STREET — OAKLAND, CALIFORNIA 94612 — (415) 272-6780
OFFICE OF THE COUNTY CLERK
E. C. DAVIDSON
CLERK-RECORDER
G. DeMARIA
CHIEF DEPUTY

COURT OF APPEAL OF THE STATE OF CALIFORNIA

IN AND FOR THE FIRST APPELLATE DISTRICT

PEOPLE VS ALLEN R. TURK

CLERK'S TRANSCRIPT ON APPEAL

From Judgment of the Superior Court of the State of California in and for the County of Alameda

Judge: GORDON BARANCO

No: C71151 Appeal Filed: 05-12-88

Appearances:

RECEIVED
AUG 10 1988
FIRST DISTRICT APPELLATE PROJECT

past record it's unfortunate but you've been involved in some rather aggressive conduct against people. So the bail should be high, I believe. $50,000 is, I think, adequate.

MR. MERRILL: You are going to make an order in this matter?

THE COURT: Yeah. I'm waiting for her to pass it to me.

THE CLERK: Wait a minute. Where are your glasses.

THE COURT: Okay. She gave it to me and I put it down. I got sidetracked here. I'm sorry.

It appears to me that the felony offense, to-wit: A violation of Section 187 of the Penal Code has been committed and there's sufficient cause to believe that you, Allen Roy Turk, are guilty thereof.

I therefore order you be held to answer to the same in the Superior Court, State of California, County of Alameda. You are ordered to appear in Department No. 11 on November 12, 1980, at 10:00 a.m., to be admitted to bail in the sum of $50,000.

MR. COMISKEY: Is there any flexibility --

THE COURT: The Sheriff --

MR. COMISKEY: On the day of the arraignment, your Honor?

THE COURT: No. No.

MR. COMISKEY: I'm going to be unable to make it. It's either have him up here by himself or put it over.

THE COURT: Or you can call one of the Public Defender's Office and ask them to stand in for you on that day.

MR. MERRILL: Or call the clerk's office and she will put it over for you.

GRE BODILY INJURY CLAUSE

(Section 1203.075 Penal Code)

The District Attorney of the County of Alameda further charges that in and during the commission and attempted commission of the above offense, the said defendant ALLEN ROY TURK, with the intent to inflict such injury, personally inflicted great bodily injury on NITA LOVE.

PAROLE CLAUSE

(Penal Code Section 1203.085)

The District Attorney of the County of Alameda further charges that at the time of the commission and attempted commission of the above offense, the said defendant ALLEN ROY TURK was on state prison parole following a term of imprisonment imposed for the crimes of Rape, a violation of Section 261 of the Penal Code of California; and Lewd and Lascivious Conduct – Copulation, a violation of Section 288a of the Penal Code of California.

FIRST PRIOR CONVICTION

(Section 667.5(a) Penal Code)

The District Attorney of the County of Alameda further charges that before the commission of the offenses specified above, said defendant ALLEN ROY TURK, on or about the 20th day of September, 1976, was convicted in the Superior Court of the State of California in and for the County of Alameda of the crime of felony, to wit: Rape, a violation of Section 261 of the Penal Code of California, and served a separate prison term therefor.

SECOND PRIOR CONVICTION

(Section 667.5(a) Penal Code)

The District Attorney of the County of Alameda further charges that before the commission of the offenses specified above, said defendant ALLEN ROY TURK, on or about the 20th day of September, 1976, was convicted in the Superior Court of the State of California in and for the County of Alameda of the crime of felony, to wit: Lewd and



(3)

Lascivious Conduct – Copulation, a violation of Section 288a of the Penal Code of California, and serve separate prison term therefor.

78

D. LOWELL JENSEN
District Attorney of the County
of Alameda, State of California

DONALD P. WHYTE, Assistant
District Attorney of the County
of Alameda, State of California

BY: William M. Baldwin

William M. Baldwin, Senior Trial
Deputy District Attorney of the
County of Alameda, State of
California

SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF ALAMEDA

# ABSTRACT OF JUDGMENT
## (Commitment to State Prison)

81

People of the State of California. Present:

vs.

ALLEN ROY TURK

Defendant

Present:
Hon. JOSEPH KARESH
Judge of the Superior Court
Kenneth Burr, D.D.A.
District Attorney
Paul Comiskey, Esq.
Counsel for Defendant

This certifies that on Sept. 16, 1981 judgment of conviction of the above-named defendant was entered as follows:
(1) Case No. 71151 Count No. One (1)
On his plea of NOT GUILTY
is convicted by VERDICT OF JURY of a Felony, to wit: First Degree Murder, a viol. of Sec. 187 Pen. C, as charged in the information. The Jury further found that the defendant DID USE deadly & dangerous weapon during the commission of the above offense. (PC Sec 12022(b)).
Defendant ADMITS HAVING SUFFERED the 1st prior conviction as alleged in the information. Sec. 667.5(a) PC). The Court ordered the degree reduced to SECOND DEGREE.
Defendant's motion for New Trial and for Probation are DENIED.
prior felony convictions charged and proved or admitted as follows:

| County and State | Crime | Disposition |
|---|---|---|
| | | |

FILED
NOV 3 - 1981
RENE C. DAVIDSON, County Clerk
By [signature]

Defendant has been held in custody for ..... days as a result of the same criminal act or acts for which he has been convicted.
Defendant ..... armed with a deadly weapon at the time of his commission of the offense or a concealed weapon at the time of his arrest within the meaning of Penal Code Section 3024.
(1) Defendant ..... adjudged an habitual criminal within the meaning of Subdivision ..... of Section 644 of the Penal Code, and the Defendant ..... an habitual criminal in accordance with provisions of Subdivision (c) of that section.
(2) IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the said defendant be punished by imprisonment in state prison of the State of California for the term provided by law and that he be remanded to the Sheriff of the County of Alameda, and by him delivered to the Director of Corrections of the State of California at the California Medical Facility, Vacaville, California.
It is ordered that sentences shall be served in respect to one another as follows:
The Defendant is sentenced to the indeterminate term of FIFTEEN YEARS TO LIFE for the SECOND DEGREE MURDER. (See Determinate Commitment for Consecutive Enhancement).
With respect to any prior incompleted sentence(s) as follows:
The Court makes no order.

(4) To the Sheriff of the County of Alameda and to the Director of Corrections at the California Medical Facility, Vacaville, California
Pursuant to the aforesaid judgment, this is to command you, the said Sheriff, to deliver the above named defendant into the custody of the Director of Corrections at the California Medical Facility, Vacaville, California
for earliest possible release.
Witness my hand and seal of said court ..... November 3, 1981

SUPERIOR COURT ALAMEDA COUNTY CALIFORNIA

RENE' C. DAVIDSON, County Clerk

By [signature], Deputy

(Do not write below this line for Certification)

24 I (5)

DIVISION THREE #3 A012701

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF ALAMEDA

---oOo---

HON. JOSEPH KARESH, JUDGE

DEPARTMENT 105

THE PEOPLE OF THE STATE OF CALIFORNIA,

PLAINTIFF,

NO. 71151

VS.

ROY ALLEN TURK,

DEFENDANT.

/

FILED

SEP 9 1981

Court of Appeal - First Dist.
Clerk of Appellate Courts

By _____ Deputy

VOLUME II

AUGUST 25 & 26, 1981

#3

APPEARANCES:

FOR THE PEOPLE

JOHN J. MEEHAN
DISTRICT ATTORNEY
BY: KENNETH M. BURR,
DEPUTY DISTRICT ATTORNEY

FOR THE DEFENDANT:

PAUL COMISKEY AND DANIEL MURRAY
ATTORNEYS AT LAW
1317 18TH STREET
SAN FRANSICSO, CA 94107

RHONDA Y. FUGAZI
CSR NO. 4305

9926/0

THE COURT: YOU HAVE HEARD WHAT THEY SAID?

THE DEFENDANT: I HEARD WHAT THEY SAID.

THE COURT: YOU FEEL YOU ARE CAPABLE OF GOING ON WITH THIS TRIAL?

THE DEFENDANT: SURE. I CAN GO ON WITH IT.

THE COURT: WHAT IS THE BASIS? THE FACTS, COUNSEL, THAT HE MAY WANT TO QUOTE SCRIPTURES; WELL, A LOT OF PEOPLE LIKE TO QUOTE SCRIPTURES. I HEARD HIM QUOTE SCRIPTURES ON THE WITNESS STAND. I THINK WE ALL QUOTE SCRIPTURES, NOT WE ALL, A LOT OF PEOPLE QUOTE SCRIPTURES. IS THAT THE BASIS OF THE 1368? 1368 IS INCOMPETENCE TO STAND TRIAL, INCOMPETENT TO COOPERATE WITH COUNSEL. HE MAY DISAGREE WITH YOU ON THE WAY YOU PROCEED WITH THE DEFENSE, BUT THAT DOESN'T MEAN HE IS NOT ABLE TO COOPERATE.

MR. COMISKEY: MY PERCEPTION IS, YOUR HONOR, THAT THE MAN IS OPERATING UNDER A DELUSIONAL SYSTEM THAT PREVENTS HIM FROM COOPERATING WITH COUNSEL.

THE COURT: WHAT IS THE DELUSION?

MR. COMISKEY: THE DELUSION IS BASICALLY RELIGIOUS IN NATURE, I BELIEVE. I AM A RELIGIOUS MAN MYSELF. AS THE COURT AND I HAVE DISCUSSED THESE THINGS WITH MR. TURK -- BUT HE BELIEVES AS HE EXPRESSED WITH ME, HE IS DEALING WITH UNJUST COUNSEL, NOT UNJUST LAWYERS BUT SITUATIONS THAT HE IS IN IN THE WORLD IS UNJUST AND THAT --

THE COURT: WELL, THERE ARE A LOT OF PEOPLE WHO SAY THE SITUATION IN THE WORLD IS UNJUST; SAY WHY DOES IT HAPPEN

THE DEFENDANT: TENTH FLOOR.

THE COURT: HE WILL COME UP TO SEE YOU. HE WILL TALK TO YOU. AND THEN TOMORROW MORNING YOU HAVEN'T LOST ANYTHING.

THEN TOMORROW MORNING, COUNSEL AFTER DISCUSSION WITH YOU, MAKE THE DETERMINATION WHICH WAY THEY WISH TO PROCEED.

BUT I WANT TO TELL YOU, YOU SHOULD BE GUIDED BY THEIR ADVICE. THERE IS AN OLD SAYING. PERHAPS YOU HAVE HEARD IT MANY TIMES. I'M NOT SAYING IT IN ANY DEROGATING SENSE OR ANY DEROGATORY SENSE OR IN ANY WAY TO DEMEAN YOU. A MAN WHO REPRESENTS HIMSELF HAS A FOOL FOR A CLIENT. YOU CAN REPRESENT YOURSELF, OBVIOUSLY. AND AS I LISTEN TO HIM, COUNSEL, AS I LISTEN TO HIM, I HONESTLY FEEL THAT HE IS COMPETENT TO PROCEED WITH THIS TRIAL. I HAVE NO DOUBT ABOUT IT. I MEAN, HE MAY HAVE, FOR EXAMPLE, WHAT YOU CALL A PSYCHOTIC EPISODE, MAY FADE IN AND PSYCHOTIC EPISODE, FADE IN AND OUT. I AM NOT A PSYCHIATRIST AND I'M NOT A PSYCHOLOGIST. HOWEVER, I WOULD SAY FOR FOUR YEARS I PRESIDED OVER THE PSYCHIATRIC COURT IN SAN FRANCISCO, THE COMMITMENT COURT, FIVE DAYS A WEEK, FOUR YEARS. THAT WAS IN SAN FRANCISCO.

I HAD SOMETHING TO DO WITH THE WRITING OF THE LANTERMAN-PETRIS SHORT ACT. I HAD A GREAT DEAL TO DO WITH IT. I TESTIFIED BEFORE THE LEGISLATURE. I AM NOT THE ORACLE, OF COURSE NOT.

BUT AS I TALKED TO THE DEFENDANT, I FEEL THAT HE HAS THE ABILITY TO PROCEED AND 1368 WOULD BE HIGHLY INAPPROPRIATE.

AUGUST 26, 1981 10:40 O'CLOCK A.M.

*********

(THE FOLLOWING PROCEEDINGS WERE HELD OUTSIDE THE PRESENCE AND HEARING OF THE JURY.)

THE COURT: YOU ARE ASKING THE COURT AGAIN TO SUSPEND CRIMINAL PROCEEDINGS?

MR. MURRAY: YES, YOUR HONOR.

DR. SHEILA BASTIAN, WHO IS A LICENSED PSYCHOLOGIST, SAW MR. TURK ON SATURDAY AND AGAIN THIS MORNING AND SHE INDICATED TO ME AFTER HER INTERVIEW WITH MR. TURK --

THE COURT: I CAN'T HEAR YOU.

MR. MURRAY: SHE INDICATED TO ME AFTER HER INTERVIEW AND EVALUATION OF MR. TURK ON SATURDAY THAT SHE CONSIDERED HIM PSYCHOTIC AT THE TIME SHE WAS INTERVIEWING HIM. SHE SAW HIM AGAIN THIS MORNING. SHE SAYS THE SAME THING. I MAKE THE MOTION UNDER 1368 BECAUSE I DON'T BELIEVE MR. TURK AT THIS POINT IS CAPABLE OF COOPERATING WITH COUNSEL. HE DOES NOT KNOW THE DIFFERENCE BETWEEN LEGAL GUILT AND MORAL OR SPIRITUAL GUILT. AND, THEREFORE, NOT KNOWING THAT DISTINCTION, HE REFUSES TO ALLOW US TO PROCEED TO PRESENT PSYCHOLOGICAL EVIDENCE IN HIS DEFENSE. AND HE ALSO WILL NOT ACCEDE TO OUR ADVICE THAT HE TESTIFY. HE SAYS HE WANTS TO WITHDRAW HIS PLEA OF NOT GUILTY BY REASON OF INSANITY; WANTS TO WITHDRAW HIS DEFENSES UNDER DIMINISHED CAPACITY, WANTS TO PROCEED WITHOUT THOSE DEFENSES. AS A LAWYER, I CAN'T COMPETENTLY REPRESENT THE MAN, GIVEN HIS STATE OF MI

WHERE HE FAILS TO KNOW THE DIFFERENCE BETWEEN LEGAL GUILT AND SPIRITUAL GUILT. THEREFORE, I CONSIDER HIM A 1368, YOUR HONOR. AND THAT IS WHY I MAKE THE MOTION.

AND DR. BASTIAN IS HERE, IF YOU WISH TO ASK HER ANY QUESTIONS.

THE COURT: DIDN'T SHE EXAMINE HIM BEFORE?

MR. MURRAY: SHE EXAMINED HIM FOR THE FIRST TIME ON SATURDAY, LAST SATURDAY.

THE COURT: WHAT WAS HER CONCLUSION LAST SATURDAY? NO 1368 LAST SATURDAY.

MR. MURRAY: THAT HE WAS PSYCHOTIC.

THE COURT: I MEAN LAST SATURDAY, NOT YESTERDAY.

MR. MURRAY: LAST SATURDAY THERE WAS NO INDICATION MR. TURK WAS GOING TO REFUSE TO ALLOW HER TO TESTIFY OR WOULD REFUSE TO TESTIFY IN HIS OWN DEFENSE. THIS WAS PRESENTED TO US AS HIS DEFENSE LAWYERS YESTERDAY.

THE COURT: THAT IS THE BASIS ON WHICH THE DOCTOR SAYS THAT HE IS PSYCHOTIC, BECAUSE HE WOULDN'T LET YOU PRESENT THE KIND OF DEFENSE THAT YOU WOULD LIKE TO PRESENT?

MR. MURRAY: DR. BASTIAN IS HERE, YOUR HONOR, AND READY TO RESPOND AND SUPPORT HER OWN OBSERVATIONS ABOUT IT.

THE COURT: SHE HAS A RIGHT TO TESTIFY AS HIS WITNESS. YOU CAN CALL HER. THE FACT THAT YOUR CLIENT DOESN'T WANT IT DOESN'T MEAN THAT YOU CONDUCT HIS DEFENSE, CAN'T CALL HER.

LN/2

JOB IS TO FIND ME GUILTY. AND IF HE CONVINCES THAT JURY I AM GUILTY, I WILL PAY THE PRICE, WHATEVER IT IS. AND IF I AM NOT FOUND GUILTY, CUT ME LOOSE, LET ME GO HOME. I WILL PAY MY TWO TICKETS, ONE IN THIS COUNTY AND ONE IN RICHMOND. THAT IS THE WAY I WANT TO COMPLETE THIS THING. I HAVE RESPECT FOR THIS MAN HERE AND RESPECT FOR MR. MURRAY. AND I WANT THEM TO RESPECT ME.

THE COURT: THEY DO.

DID YOU MAKE A MOTION UNDER 1368?

MR. MURRAY: YES.

THE COURT: I DENY THE MOTION TO SUSPEND THE PROCEEDINGS. I DO IT ON THE BASIS OF MY STATEMENT YOU MADE ABOUT WHAT THE PSYCHOLOGIST SAID, ABOUT THE REPORT THAT I HAVE IN THE FILE FROM GUDIKSEN & BURSTEIN, FROM MY OBSERVATIONS OF THE DEFENDANT, MERE STATEMENT THAT HE MAY BE, AND YOU ARE DISTINGUISHING BETWEEN LEGAL GUILT AND RELIGIOUS GUILT. HE IS COMPETENT TO STAND TRIAL AND COOPERATE WITH COUNSEL.

MR. COMISKEY: I WOULD ONLY ADD, YOUR HONOR, THAT AS FAR AS THE MOTION, I STATED YESTERDAY I DO BELIEVE THAT MR. TURK SUFFERS FROM PARANOIA WHICH IS BASICALLY A DEEP INABILITY TO TRUST. AND I THINK THAT HE CANNOT TRUST US SUFFICIENTLY TO ALLOW US TO PUT ON THE DEFENSE.

THE COURT: I DON'T THINK IT HAS ANYTHING WITH NOT TRUSTING YOU. JUST DOESN'T FEEL HE WANTS THE DEFENSE. IT HAS NOTHING TO DO WITH TRUSTING YOU. NO MATTER WHO THE LAWYER WOULD BE, WOULD SAY, "I DON'T WANT THAT DEFENSE." IS THAT

OR GRANDIOSE DELUSIONS OR DELUSIONAL JEALOUSY OR AUDITORY HALLUCINATIONS WITH PERSECUTORY GRANDIOSE CONTENT.

Q. NOW WHERE ARE THESE CRITERIA COMING FROM?

A. THESE ARE COMING FROM THE D.S.M. THREE, THE DIAGNOSTIC AND STATISTICAL MANUAL WHICH IS THE LATEST PUBLICATION SITTING THERE ON THE TABLE, THAT GREEN BOOK. THIS IS USED BY THE AMERICAN MEDICAL ASSOCIATION.

Q. DOES THAT MEAN AMERICAN PSYCHIATRIST BIBLE?

A. AND AMERICAN PSYCHIATRIC ASSOCIATION.

Q. HOW MANY OF THESE CATEGORIES INVOLVED MR. TURK? YOU MENTIONED FOUR. HOW MANY OF THEM APPLY TO HIM?

A. I HAVE SEEN EVIDENCE OF PERSECUTORY DELUSIONS, THE GRANDIOSE DELUSIONS AND THE HALLUCINATIONS IN MY INTERVIEW WITH HIM.

Q. NOW, CAN YOU TRANSLATE ALL OF THAT INTO LANGUAGE OR DESCRIPTIONS OF A NORMAL FUNCTIONING REASONABLE PERSON?

A. A NORMAL PERSON HAS NORMAL PERCEPTION ABOUT WHAT IS GOING ON AROUND THEM.

Q. WHICH MEANS WHAT?

A. IT MEANS THAT THEY SEE THINGS AS THEY REALLY ARE.

Q. THINGS, YOU MEAN LIKE OBJECTS?

A. OBJECTS.

Q. WHAT ABOUT THEIR ABILITY TO USE LANGUAGE TO ACCURATELY DESCRIBE WHAT THEY SEE?

A. WHEN A PERSON HAS A DELUSION OR A HALLUCINATION, N ONLY CAN THEY NOT SEE THINGS ACCURATELY BUT THEY MISINTERP

COURTROOMS OF ALAMEDA COUNTY AS AN EXPERT TO TESTIFY?

THE COURT: EXCUSE ME FOR INTERRUPTING. YOU MEAN SHE HAS NOT TESTIFIED IN COURT IN A CRIMINAL PROCEEDING GIVEN AN EXPERT OPINION? IS THAT WHAT YOU WANT TO ASK HER?

MR. BURR: YES.

THE COURT: BUT YOU MUST REMEMBER, AS SHE SAID, SHE IS QUALIFIED, THAT SHE IS ON THE LIST APPOINTED BY JUDGE MC KIBBON. CORRECT?

THE WITNESS: YES.

THE COURT: YOU USE THE WORD "QUALIFIED." YOU MEAN --

MR. BURR: THERE IS A DIFFERENCE AND THAT IS WHAT WE ARE GOING THROUGH RIGHT NOW, WHETHER SHE IS QUALIFIED TO REINDER AN OPINION IN THIS COURTROOM, IN THIS PROCEEDING.

YOU MIGHT BE ON A LIST BUT WHETHER YOU ARE QUALIFIED, THAT IS A DIFFERENT THING ALTOGETHER.

MR. MURRAY: I OBJECT TO ALL THIS AS SUMMATION AND ARGUMENT DESIGNED ONLY TO IMPRESS THE JURY.

THE COURT: I THINK YOU HAVE CONDUCTED A SUFFICIENT VOIR DIRE. IF THEY ARE GOING TO ASK HER AN OPINION, THE COURT SHOULD NOT CONSIDER THE FACT THAT SHE IS ON THE LIST OF THE COURT.

MR. BURR: NO, I DON'T. I DO NOT.

THE COURT: WELL, COUNSEL, YOU MUST UNDERSTAND THAT WHAT WEIGHT TO BE GIVEN TO THE OPINION OF THE EXPERT IS UP TO THE JURY. THE JURY CAN ACCEPT IT. WHAT YOU ARE SAYING IS, I ASSUME, SHE SHOULD NOT BE PERMITTED TO GIVE AN OPINION

BECAUSE SHE HAS GIVEN AN OPINION BEFORE. IS THAT RIGHT?

MR. BURR: THAT I THINK IS A VERY SIGNIFICANT CRITERIA.

THE COURT: WELL, HOWEVER, WHEN DO YOU START?

MR. BURR: PLUS THE WITNESS HAS INDICATED THAT SHE DOESN'T CONSIDER HERSELF TO BE A FORENSIC PSYCHOLOGIST AND HAS NOT HAD THE EXPERIENCE AND EXPOSURE AND THE COURT SHOULD NOT PERMIT AN OPINION TO BE GIVEN TO THE COURT.

THE COURT: I DON'T KNOW, COUNSEL, WHETHER SHE IS GOING TO BE ASKED TO GIVE AN OPINION.

MR. BURR: I SEE.

THE COURT: I DON'T KNOW.

MR. BURR: WELL, WE WILL SEE THEN. THANK YOU.

THE COURT: NOW, PROCEED.

MR. BURR: AT THIS POINT, THE PEOPLE OBJECT FOR HER TO RENDER ANY OPINION AS NOT BEING QUALIFIED.

THE COURT: WELL, YOU GO ON. I DON'T HAVE TO RULE AHEAD OF TIME. GO AHEAD, COUNSEL.

DIRECT EXAMINATION RESUMED

BY MR. MURRAY:

Q. MRS. BASTIEN, HOW MANY HOURS OF EVALUATION HAVE YOU DEVOTED TO ALLEN ROY TURK IN THE PREPARATION OF THE REPORT HAVING TO DO WITH THE ABNORMALITY ISSUES UNDER MENTAL ILLNESS, MENTAL DEFECT, MENTAL DISORDER AND THE RELATED LEGAL ISSUES INVOLVED IN THIS CASE, THAT IS, WHETHER OR NOT MR. TURK HAD THE CAPACITY TO PREMEDITATE, DELIBERATE, WHETHER HE HAD THE CAPACITY TO HARBOR IMPLIED MALICE OR WHETHER HE HAD THE

BECAUSE SHE HAS GIVEN AN OPINION BEFORE. IS THAT RIGHT?

MR. BURR: THAT I THINK IS A VERY SIGNIFICANT CRITERIA.

THE COURT: WELL, HOWEVER, WHEN DO YOU START?

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THE COURT: I DON'T KNOW, COUNSEL, WHETHER SHE IS GOING TO BE ASKED TO GIVE AN OPINION.

MR. BURR: I SEE.

THE COURT: I DON'T KNOW.

MR. BURR: WELL, WE WILL SEE THEN. THANK YOU.

THE COURT: NOW, PROCEED.

MR. BURR: AT THIS POINT, THE PEOPLE OBJECT FOR HER TO RENDER ANY OPINION AS NOT BEING QUALIFIED.

THE COURT: WELL, YOU GO ON. I DON'T HAVE TO RULE AHEAD OF TIME. GO AHEAD, COUNSEL.

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THEM.

Q. MISINTERPRET IN WHAT SENSE, SEEING AN ORANGE AND THINKING IT IS AN APPLE OR IS IT MORE SUBTLE THING THAN THAT?

A. IT IS MORE SUBTLE THAN THAT.

Q. GIVE US AN EXAMPLE OR THESE CONCEPTS OR THESE DESCRIPTIONS IN RELATION TO MR. TURK'S BRAIN FUNCTION OR MIND FUNCTION.

A. ALL RIGHT. IN TERMS OF PERCEPTION, WHEN I INTERVIEWED MR. TURK, HE SAID, "THE LORD SHOWED HIM." I ASKED HIM HOW -- I ASKED HIM HOW HE WOULD KNOW WHO WAS GOOD BECAUSE HE WAS TALKING ABOUT PEOPLE. AND HE SAID, "I PRAY TO THE LORD TO SHOW ME WHO IS GOOD AROUND ME." AND I ASKED HIM HOW HE WOULD KNOW THAT AND HE POINTED AND SAID, "THE LORD SHOWS ME THOSE LITTLE PEOPLE WITH BIG MOUTHS RIGHT HERE." AND HE POINTED TO THE RIGHT SHOULDER, AND SAID, "THEY WERE BITING." I QUESTIONED HIM ON THIS AND HE SAID THAT HE ACTUALLY SAW THESE PEOPLE, "ONES THAT LAUGH AND TALK IN MY FACES ARE THE NO GOOD PEOPLE WITH THE BIG RED MOUTH." AND ANOTHER POINT IN THE INTERVIEW HE SAID THAT THROUGH SOME SUPERNATURAL UNEXPLAINED WAY TO HIM HE KNEW WHAT PEOPLE ON THE STREET WERE SAYING ABOUT HIM RIGHT NOW, BOTH MALES AND FEMALES.

Q. NOW, DOCTOR, HOW DO YOU KNOW THAT MR. TURK WASN'T TELLING THE NICE LADY PSYCHOLOGIST SOMETHING THAT WAS GOING TO MAKE HIM SOUND CRAZY?

A. BECAUSE HE DIDN'T FAKE CRAZY ON THAT M.M.P.I. TEST, BECAUSE HE TRIES TO HIDE HIS CRAZINESS.

Q. NOW, WHAT ABOUT THE CONVERSATION THAT YOU WERE HAVING WITH HIM? HOW DO YOU EVALUATE VERBALLY, VERBAL EXPRESSIONS IN RESPONSE TO QUESTIONS THAT YOU ASKED HIM?

A. I FELT IT WAS GENUINE. I DIDN'T THINK I WAS BEING MANIPULATED OR THAT HE WAS TRYING TO. I THINK HE WAS ALSO VERY CONCERNED THAT I TALK ABOUT THESE THINGS HERE. HE DIDN'T WANT ME TO.

THE COURT: WHAT IS THE DIFFERENCE BETWEEN A DELUSION AND A HALLUCINATION?

THE WITNESS: A DELUSION IS WHEN YOU HAVE A THOUGHT THAT IS NOT SO. A HALLUCINATION -- THERE ARE TWO KINDS -- WELL MAINLY TWO KINDS THAT WE TALK ABOUT. ONE IS AN AUDITORY HALLUCINATION WHERE YOU HEAR THINGS; LOOK; YOU HEAR SOMEONE TALKING WHEN THERE ISN'T ANYONE TALKING THERE. A VISUAL HALLUCINATION, WHICH HE ALSO HAD, IS WHEN YOU SEE THINGS THAT AREN'T THERE.

HE ALSO TOLD ME UPON QUESTIONING THAT HE SAW FLASHING LIGHTS, WHICH SUGGEST TO ME MORE ORGANIC BRAIN SYNDROME THAN A PARANOIA. THAT PARTICULAR KIND OF DELUSION IS MORE APPROPRIATE FOR ORGANIC BRAIN SYNDROME FOR SOMEONE WHO HAS A DAMAGED BRAIN IN SOME WAY.

NOW, THIS MAN HAS HAD AT LEAST FIVE HEAD INJURIES. SO THAT, IN ADDITION TO SYPHILIS, THERE MAY BE SOME SIGNIFICANT RESIDUAL BRAIN INJURY.

THE COURT: YOU SAY "SYNDROME." WHAT DO YOU MEAN BY SYNDROME?

A. WHEN I SAY ORGANIC BRAIN SYNDROME, I MEAN A WHOLE LOT OF THINGS GOING ON TO MAKE UP A CONCEPT THAT WE CALL SYNDROME.

THE COURT: THANK YOU.

BY MR. MURRAY:

Q. DOCTOR, YOU SAID DELUSION IS THOUGHTS THAT AREN'T THERE. THE THOUGHTS THAT HE IS EXPRESSING ARE THERE IN HIS HEAD, WEREN'T THEY?

A. THEY ARE THERE IN HIS HEAD.

Q. SO THEY ARE REAL TO HIM?

A. THEY ARE REAL TO HIM.

Q. SO WHAT IS THE DYSFUNTION INVOLVED WITH CONCEPTUAL CONCEPTUALIZING THAT YOU REFER TO AS DELUSION?

A. I AM NOT SURE WHAT YOU ARE GETTING AT.

Q. WELL, IS DELUSION -- CAN IT BE CALLED A FIXED FALSE IDEA ABOUT SOMETHING?

A. IT CERTAINLY CAN. HE THINKS PEOPLE ON THE STREET ARE TALKING ABOUT HIM. RIGHT THEN AND THERE YOU KNOW WHAT IS GOING ON IN HIS MIND. HE KNOWS WHAT I AM GOING TO SAY ABOUT HIM WHEN I LEAVE, NOT BECAUSE HE ASSUMES I AM GOING TO SAY, BECAUSE HE ACTUALLY HEARS MY CONVERSATION. THAT IS A DELUSION.

Q. IS THIS WHAT YOU REFER TO AS THINKING DYSFUNCTION?

A. THAT IS A KIND OF THINKING DYSFUNCTION.

Q. WHAT OTHER KINDS OF THINKING DYSFUNCTIONS DID YOU OBSERVE ABOUT MR. JURK, IF ANY?

can make the inference if he is drinking and if you can establish that, then you might say then there may have been some delusional material. I don't know what that was but there is that possibility of that step-by-step inference.

Q. Now when he says he gets paranoid, that is in the schizophrenia, isn't it? A. It certainly is and can be.

Q. Wait a second. Yesterday you told me that paranoid and schizophrenia are two different things. If you diagnose them separately, correct? A. It depends by what he means by "paranoid."

Q. Now you are relying upon his expertise as a psychologist or psychiatrist, is that what you are telling me?

A. There are over 40 doctors who diagnosed him as paranoid schizophrenia. He has a history of bizarre delusions. He's given an example of those delusions when he is paranoid. He thinks he is an agent of God. Those examples are significant to me and suggest schizophrenia, paranoid schizophrenia.

Q. When did he say that he was an agent of God?

A. It is in the record.

Q. When did he say that? A. He said it between 1964 and the present time. He also told me that when I interviewed him in the jail.

Q. Did he say that he was an agent of God at the time he acted out and killed this woman? A. No, he did not.

Q. So he said it in other context, is that what you are telling us? A. He said it at another time.

read from him. You can't comment on it.

MR. MURRAY: Q. Have you read the par's that are relevant to you?

A. Yes, in this report.

Q. Would it be useful for you -- strike that. How many times was Mr. Turk admitted to mental hospitals in this state?

A. Fifteen times with over five years of total committment time.

Q. And beginning what year and concluding in what year?

A. Beginning in 1974 -- 1964 and concluding in '78.

MR. BURR: Excuse me. I think that misstates the record.

THE COURT: Is that correct?

THE WITNESS: To the best of my knowledge. I am not trying to mislead.

MR. MURRAY: Q. In any event, during those admittances to these mental hospitals, was Mr. Turk consistently described as a psychotic?

A. He was consistently described as a psychotic. I would say 99 percent of the time.

Q. And you have reviewed the records connected with those admissions?

A. Yes.

Q. And do you have any quarrel with any of the conclusions reflected in those reports? Do you have any disagreement with any of the conclusions by any psychiatrists, psychologists, who determined him to be a psychotic as reflected in those reports?

A. No.

MR. MURRAY: I have nothing further, Your Honor.

RECROSS EXAMINATION

BY MR. BURR:

Q. Taking it backwards, could you find the reports that indicate he was in a mental hospital in 1978? A. May I show this t:

the Judge? May I simply hand the report to the Judge?

MR. MURRAY: May we approach the bench, Your Honor?

(Discussion at bench, not reported.)

MR. MURRAY: We would stipulate that psychosis recollection is an area when it was '74 as opposed to '78.

THE COURT: All right, the stipulation is noted and made a part of the record.

MR. BURR: Q. Now with respect to the -- does that diminish the number of times he was hospitalized from 15 to 14?

A. Yes, that would.

Q. Those 14 occasions he was institutionalized, isn't it correct to say that five of them, in fact, constituted a single or continuous transaction of the same incident?

A. I don't understand the question.

MR. MURRAY: Ambiguous. I don't understand what the word "incident" refers to.

MR. BURR: May we approach?

(Discussion at bench, not reported.)

THE COURT: I think you have a stipulation. Five of these what we call committments was really a single committment, is that right?

MR. MURRAY: With Mr. Turk subsequently being in five different institutions --

MR. BURR: I object. We are exceeding the scope of the stipulation. The stipulation the People would offer at this point in time is that five of the transactions this witness has alluded to really, in fact, constitute one committment and that was the last committment which flowed from 1970 to 1974.

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while it helps this court because I of pretrial calendar settlement calendar on Friday I think it is good for the lawyers in a case of this gravity to have time. So if you don't have any objection we won't meet on Fridays.

MR. MURRAY: No objection, Your Honor.

MR. BURR: No objection.

THE COURT: We will now be -- one more thing.

MR. MURRAY: I wanted -- Your Honor, the only thing I was going to ask is it would be possible, whether we need to help the Court do this or not, but he's going to have stitches out of his face and Friday would be a good day to do that. Basically what should I do about that?

MR. BURR: Perhaps the Court could have a minute order issued having the defendant transported to the hospital on Friday so that he could have the necessary medical attention.

THE COURT: Who did the eye for you? Who put the stiches in it?

THE DEFENDANT: Female doctor. I forgot for her name.

THE COURT: What hospital?

THE DEFENDANT: Highland.

THE COURT: When are they ready to take your stitches out?

THE DEFENDANT: Friday.

THE COURT: He should be taken Friday to the hospital to get the stitches out. That is an order of the Court. All right.

THE CLERK: All right.

# Superior Court Of The State Of California In And For the County Of Alameda

Dept. No. 105

Action No. 71151

THE PEOPLE OF THE STATE OF CALIFORNIA

ALLEN ROY TURK

FILED

SEP 16 1981

RENE C. DAVIDSON County Clerk

VS.

DEPUTY

Plaintiff

Defendant

## VERDICT OF JURY

We, the jury in the above entitled cause, find the defendant, ALLEN ROY TURK, Guilty of the crime of a felony, to wit: Murder, a violation of Section 187 of the Penal Code of California as charged in the Information, and we further find the degree of murder to be first/second degree.

DATED: 9-16-81

SIGNED: [signature], Foreperson

We, the jury, further find that in and during the commission of the above offense, the defendant did/did not personally use a deadly and dangerous weapon, to wit: a Gas Meter Co

Dated 9-16-81

[signature], Foreper

VERDICT OF JURY

(17)

202-742 •

SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF AL EDA

DEPT. 10

Date: Oct. 7, 1981 Hon. JOSEPH KARESH, Judge; Jeff Manguiat, Deputy Sheriff; Toni Locke/11, Deput; Rhonda Fugazi, Repor

THE PEOPLE OF THE STATE OF CALIFORNIA — Plaintiff

vs.

ALIEN ROY TURK — Defendant ____

Counsel appearing for Plaintiff: Kenneth Burr, DDA

Counsel appearing for Defendant: Paul Comiskey, Esq.

Probation Officer appearing: Gwen Hopper, DPO

ACTION No. 71151

PFN. ____

CEN. ____

NATURE OF PROCEEDINGS:

The ( ) arraignment
( ) trial
( ) report and sentence
( ) petition for revocation of probation
( ) sentence after revocation of probation
( ) modification of probation

(xx) Motion for new trial/
Motion to reduce verdict

Defendant's motion for new trial is argued and submitted. The motion is denie

Defendant's motion to reduce degree of offense to second degree is argued and submitted. The motion is granted.

Court orders referral to the Probation Department.

Action is by the Court continued to Nov. 3, 1981 at 9:00 a.m. in D-105 for Report & Sentence

Defendant ____ is ____ present.

(18)

45

202-752 1M 5-73 (Rev.)

SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF ALAMEDA

DEPT.

Date Nov 3,1981 Hon. JOSEPH KARESH, Judge; Rose Friday, Deputy Sheriff; Rhonda Fugazi, Reporter

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff — Counsel appearing for Plaintiff: Kenneth Burr, D.D.A.

vs.

Counsel appearing for Defendant: Paul Comiskey, Esq.

ALLEN ROY TURK, Defendant — Probation Officer appearing: Gwen Hopper, D.P.O.

NATURE OF PROCEEDINGS: REPORT AND SENTENCE

ACTION No. 71151
ABH 408
0156084

Defendant is present. Defendant's motion for Probation is denied.

The defendant having been convicted on Sept.16, 1981 by
( ) plea of guilty
( ) decision of Court
(X) verdict of jury
of the offense .....of a felony, to wit: First Degree Murder, a violation of Section 1
California Penal Code, as charged in the information.
The Jury further found that the defendant DID USE a deadly and dangerous weap
during the commission of the above offense. (PC Section 12022(b)).
The defendant ADMITS HAVING SUFFERED the first prior conviction as alleged in
information. (Section 667.5(a) PC)
On October 7, 1981, the defendant's motion to reduce the degree of the offens
by the Court GRANTED, and the degree is reduced to SECOND DEGREE.
The defendant's motion for new trial is DENIED.
The Court orders the GBI Clause, the Parole Clause and the Second Prior Con
STRICKEN.

The defendant is arraigned for sentence and has no legal cause to show why the judgment of this should not be pronounced against him. The Court pronounces judgment.

Defendant has been held in custody for 696 days as a result of the same criminal act or acts for w he has been convicted, including 464 actual days plus 232 days conduct credit.

It is ORDERED that said defendant be punished by imprisonment in state prison of the State of Calif for the term ~~xxxxxxxxxxxx~~ of FIFTEEN YEARS TO LIFE for the SECOND DEGREE MURDER, pl

It is further ORDERED that sentences shall be served in respect to one another as follows:

For the First Prior Conviction admitted, to wit: Rape, a violation of Section California Penal Code, and served a separate prison term, the defendant is se for THREE YEARS to be served CONSECUTIVELY to the Second Degree Murder Term. For the Use Clause under Section 12022.(b) PC, the defendant is sentenced to additional ONE YEAR CONSECUTIVELY. TOTAL TERM IMPOSED NINETEEN YEARS TO LIFE

and in respect to any prior incompleted sentence(s) as follows:

The Court makes no order.

It is further ORDERED that the defendant is remanded to the custody of the Sheriff of the Cour Alameda to be by him delivered to the Director of Corrections of the State of California at Cali Medical Facility, Vacaville, California.

The Defendant advised of his rights to Appeal.
The Defendant's Motion for Bail Pending Appeal is DENIED.

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FILED

MAY 05 1993

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

| | |
|---|---|
| ALLEN R. TURK,<br><br>Plaintiff-Appellant,<br><br>v.<br><br>ALAMEDA COUNTY; ROBERT G. BORG, Warden, California, Folsom State Prison,<br><br>Defendants-Appellees. | No. 92-15535<br><br>D.C. No. CV-90-00079-VRW<br><br>M E M O R A N D U M* |

Appeal from the United States District Court
for the Northern District of California
Vaughn R. Walker, District Judge, Presiding
Submitted December 17, 1992**
San Francisco, California

Before: NORRIS, BEEZER, and KLEINFELD, Circuit Judges

Allen Turk appeals pro se from the district court's denial of his habeas petition. In 1981, Turk was convicted of second degree murder, use of a deadly weapon, and violation of parole. In his habeas petition, Turk argues that (1) the trial court denied him due process by failing to hold a hearing to determine whether he was competent to stand trial; and (2) his

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously finds this case suitable for decision without oral argument. Fed. R. App. P. 34(a) and Ninth Circuit Rule 34-4.

counsel rendered ineffective assistance by failing to raise the competency issue on appeal. We reverse and remand.

We review a trial court's denial of a competency hearing to see whether the evidence raised a bona fide doubt as to the defendant's competency to stand trial. "On appeal, we inquire 'whether a reasonable judge ... should have experienced doubt with respect to competency to stand trial.'" Hernandez v. Ylst, 930 F.2d 714, 716 (9th Cir. 1991) (quoting de Kaplany v. Enomoto, 540 F.2d 975, 983 (9th Cir. 1976) (en banc), cert. denied, 429 U.S. 1075 (1977)).[1] The test is not whether the trial judge did in fact experience doubt, but whether he or she should have experienced doubt. See Hernandez, 930 F.2d at 716 ("'The test is an objective one.'" (quoting Pedrero v. Wainwright, 590 F.2d 1383, 1388 (5th Cir.) (Wisdom, J.), cert. denied, 444 U.S. 943 (1979)).

Here, there was sufficient evidence to create a bona fide doubt as to the defendant's competence to stand trial.

First, Turk's counsel believed that Turk was incompetent to stand trial. Defense attorney Comiskey moved to have a competency hearing under California Penal Code § 1368 on August 25, 1981. Defense attorney Murray made a second § 1368 motion the

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1 Cf. United States v. Lewis, No. 92-50384, slip op. at 3541 (9th Cir. Apr. 9, 1993) ("A court reviewing a record for evidence of a defendant's competence in a prior proceeding must determine 'whether evidence of incompetence was such that a reasonable judge would be expected to experience a genuine doubt respecting the defendant's competence.'" (citation omitted)).

following day. A defense attorney's opinion about his or her client's competence to stand trial carries weight. Hernandez, 930 F.2d at 718 ("While the opinion of [defendant's] counsel certainly is not determinative, a defendant's counsel is in the best position to evaluate a client's comprehension of the proceedings."). Defense attorney Comiskey explained that his client had delusions of a "religious nature." Red at 6.

Second, Turk was prone to "psychotic episodes." As the trial judge said:

> [A]s I listen to him, I honestly feel that he is competent to proceed with this trial. I have no doubt about it. I mean, he may have, for example, what you call a psychotic episode, may fade in and ... out.

2 RT 271.

Third, petitioner's counsel reported to the court on August 26, 1981, that Dr. Sheila Bastian, a psychologist, had interviewed the petitioner and found him "psychotic at the time she was interviewing him." Red at 7; 2 RT 278. Dr. Bastian had examined the petitioner that morning. Dr. Bastian later appeared before the court and testified that she suspected that petitioner had "organic brain syndrome," possibly associated with "at least five head injuries." Red at 9; 2 RT 494.

Fourth, petitioner had a long history of psychological problems for which he had been committed to mental hospitals on approximately 10 occasions. The last hospitalization appears to have taken place in 1974, about seven years before the trial. Dr.

Bastian testified that she had a medical history file with "almost forty doctors' reports in it," with "ninety-eight percent" of the reports concluding that petitioner was a paranoid schizophrenic. Red at 9; 2 RT 484. These reports were apparently made during the time petitioner was hospitalized.

Finally, petitioner suffered a head injury just a few days before the start of the trial.

All these facts taken together established a bona fide doubt as to the defendant's competency to stand trial.

To support its argument that no hearing was necessary, the government relies on the testimony of Drs. Burstein and Gudiksen, who testified before the court on the petitioner's mental defenses. Dr. Burstein, a psychologist, testified that records of petitioner's psychiatric history showed that no one had diagnosed petitioner as schizophrenic after 1974. He also opined that the many doctors who had, before 1975, diagnosed petitioner as being schizophrenic were wrong in making that diagnosis. Dr. Gudiksen, a psychiatrist, testified that petitioner did not suffer from paranoid schizophrenia at the time she examined him or at the time of the crime. Instead, she believed that petitioner had an "anti-social personality disorder" without "organic brain syndrome." Red at 10-11. This evidence did not, however, erase the doubt that the other evidence had created about petitioner's competence to stand trial.

Because petitioner's trial took place more than a decade ago, a retrospective determination of petitioner's competency at that trial is no longer possible. We therefore vacate petitioner's convictions. The state is free to retry the petitioner, "assuming, of course, that at the time of such trial he is competent to be tried." Drope v. Missouri, 420 U.S. 162, 183 (1975).[2]

REVERSED and REMANDED with instructions to grant the petition for a writ of habeas corpus.

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2 Because we grant the habeas petition on due process grounds, we do not reach the ineffective assistance of counsel claim.

FILED

MAY 05 1993

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

Turk v. Alameda, No. 92-15535

Kleinfeld, J., dissenting:

I respectfully dissent.

The federal habeas corpus statutory standard at 28 U.S.C. § 2254(d)(8) controls our review of the state court's determination that no competency hearing was needed. Maggio v. Fulford, 462 U.S. 111, 117 (1983). The statute requires us to accord a "presumption of correctness" to the state court's determination. See Evans v. Raines, 800 F.2d 884, 885 (9th Cir. 1986). The determination that no competency hearing was required is factual, and we cannot overturn it if it was "fairly supported by the record.'" Maggio v. Fulford, 462 U.S. 111, 117 (1983) quoting 28 U.S.C. § 2254(d)(8). We cannot substitute our judgment as to the credibility of evidence for that of the state court. Id. at 113.

The majority has not discussed application of Maggio, relying instead upon our subsequent decisions in Hernandez v. Ylst, 930 F.2d 714, 716 (9th Cir. 1991), and United States v. Lewis, No. 92-50384 (9th Cir. 1993). Neither of these cases cites or discusses Maggio, so they cannot be treated as circuit decisions interpreting the Supreme Court decision. If they were precedent on the question presented, then we would be required to follow them. United States v. Mandel, 914 F.2d 1215, 1221 (9th Cir. 1991). But they are not, because the question of standard of review was not at issue and applicability of Maggio was not

considered in those cases. We must therefore follow Maggio. Cross v. Bruning, 413 F.2d 678, 680 (9th Cir.), cert. denied, 396 U.S. 970 (1969). The only Ninth Circuit case citing Maggio is Evans v. Raines, 800 F.2d 884, 887 (9th Cir. 1986), which applies the rule that determinations of competency are entitled to a presumption of correctness.

The majority correctly articulates the substantive test as whether a reasonable judge should have experienced doubt as to Turk's competency. Under Maggio, we must accord a presumption of correctness to the state court determination to the contrary, and uphold it if it was fairly supported by the record. Applying this deferential standard, I do not think we can set aside the state court determination.

Turk was charged with and convicted of murder, for beating a woman to death. Turk's defense was to be that because of his diminished capacity, he was only capable of manslaughter. Midway through trial, Turk told his lawyer that he did not want to use the diminished capacity defense. Turk's lawyer then requested a competency hearing. Turk's lawyer said that because Turk could not distinguish between legal and spiritual guilt, Turk would not accede to his counsel's suggestion that he offer diminished capacity as a defense.

The state judge reviewed reports on Turk's mental health written by three different specialists. One psychologist reported

that Turk had brain damage and was psychotic, but two other experts contradicted this opinion. One psychiatrist found that although Turk had been schizophrenic, his disease was in remission, and the other diagnosed Turk as having an anti-social personality disorder, but not schizophrenia.

The state trial judge engaged Turk in a colloquy. Turk told the judge, "Well, I just, you know, I'd rather go to trial as it is right now without anyone coming, any expert witness. What I didn't want was N.G.I., the defense for diminished capacity. I don't want to deal with that." He also told the judge, "I want to go straight into this trial as it is. I want to withdraw the plea of not guilty by reason of insanity, N.G.I., and I don't want the matter of diminished capacity." Unlike us, the state judge observed Turk as Turk spoke, and observed Turk throughout a twenty day trial. The judge concluded, based on his observation of Turk and his colloquy with him, the psychiatric reports, and counsel's recommendation, all considered in light of the judge's own extensive experience presiding in psychiatric court, that "as I listen to him, I honestly feel he is competent to proceed with this trial -- I have no doubt about it," and "as I talked to the defendant, I feel that he has the ability to proceed."

Those are the critical findings. The record fairly supports them. Turk's own statements show reasoned analysis and judgment about how he wished to proceed, and evinced his understanding of the proceedings and his ability to make decisions based upon

realistic perception of the alternatives. The colloquy, along with the trial judge's other extensive observation of Turk and two of the psychiatric reports, afforded a substantial evidentiary basis to the state trial judge for his determination that there was no bona fide doubt as to Turk's competency to stand trial.

If we were permitted to substitute our judgment de novo, we might conclude that the report of brain damage and psychosis required a hearing. But we may not, under Maggio, accord so little deference to a state court determination. We should therefore affirm.

United States District Court
For the Northern District of California

FILED
FEB 27 1 29 PM '92
U.S. DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

ALLEN R. TURK,

Petitioner,

v.

ROBERT BORG, Warden, Folsom State Prison; PEOPLE OF THE STATE OF CALIFORNIA; ALAMEDA COUNTY SUPERIOR COURT;

Respondents.

NO. C-90-0079-VRW

ORDER

ENTERED IN CIVIL DOCKET

Petitioner, a prisoner at California's New Folsom State prison, filed a petition for writ of habeas corpus. In a preliminary order dated March 26, 1991, the court found that the petition stated a claim for relief on the grounds that the state failed to afford him an evidentiary hearing regarding his competence to stand trial and that he may have been denied effective assistance of counsel. An order to show cause issued

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which the state answered and to which petitioner filed a traverse.

Having now considered the record, applicable law and the parties' submissions, the court concludes that there is no genuine issue of material fact and no merit to petitioner's claims.

Petitioner was convicted of murder. After clearly and unequivocally submitting himself to trial without asserting a diminished capacity defense, and after questioning by the trial court about petitioner's understanding of the consequences of his decision and his capability to make this decision and to stand trial and assist in his defense, and after the trial court's examination of petitioner and his counsel, and after being afforded a trial in which his mental state was in issue, petitioner now contends that the trial court should have suspended the trial and conducted a proceeding under Cal. Penal Code section 1368. The issue here is whether the trial court denied a request for competency hearing on the basis of fairly supported factual conclusions. The trial court correctly decided that there was no substantial evidence to warrant reasonable doubt about petitioner's competency to stand trial. Petitioner was deprived of no constitutional right.

Petitioner's claim for ineffective assistance of appellate counsel is similarly without merit. Appellate counsel need not - and manifestly should not - raise every conceivable issue. Counsel's work was objectively reasonable and there is no probability that had counsel challenged the trial court's



United States District Court
For the Northern District of California

decision to deny the competency hearing petitioner would have prevailed on appeal.

The petition is **DENIED** and order to show cause discharged.

IT IS SO ORDERED.

DATED: February 27, 1992

VAUGHN R. WALKER
United States District Judge

United States District Court
For the Northern District of California

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IN OFFICIAL REPORTS

COPY

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT, DIVISION THREE

FILED
APR 20 1984
Court of Appeal - First Dist.
CLIFFORD C. PORTER, Clerk
By _____ DEPUTY

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

ALLEN ROY TURK,

Defendant and Appellant.

A012701

(Super. Ct. No. 71151)

Appellant Roy Allen Turk was convicted by a jury of first degree murder. The trial court denied his new trial motion, but reduced the offense to second degree murder. Appellant contends that (1) the trial court erred when it denied his mid-trial motion for substitution of counsel; and (2) the prosecutor committed prejudicial misconduct. We affirm the judgment.

We need not recite the facts in any detail. Juanita Whitaker died as a result of severe head injuries; her body was found near appellant's truck. Appellant told at least two acquaintances that he had beaten a woman and thought he killed her.

Prior to the commencement of trial, appellant pleaded not guilty by reason of insanity. In his opening statement, one of appellant's two attorneys[1/] told the jury that the evidence would show that what had occurred was only a manslaughter,

1/ Appellant does not dispute respondent's statement that the attorneys were privately retained, not appointed.

because of appellant's mental illness and alcohol and drug use. However, on the eighth day of the trial, after the prosecution had presented its case, and after four defense witnesses had testified, appellant's attorneys informed the court that contrary to their advice, appellant did not want any psychologists to testify. Appellant now contends that what had occurred was a breakdown in the attorney-client relationship of such magnitude as to jeopardize his right to effective assistance of counsel, and that it was clear that he wanted a substitution of counsel. Appellant contends that the court failed to conduct an inquiry into the severity of the breakdown, and that it erred in denying his motion for substitution of counsel.

First, appellant's contention that the trial court did not inquire about his dissatisfaction with counsel is incorrect. The court gave appellant ample opportunity to explain his disagreements with counsel, and questioned him carefully in an attempt to determine why he was dissatisfied and what he wanted to do.

Moreover, contrary to appellant's current assertion, it was not clear what he was requesting at trial. For example, he stated at one point that his only request was to "withdraw all physicians." Later, he reiterated that the only problem he had with his attorneys was that he wanted to withdraw his "plea of N.G.I. and diminished capacity." After additional questioning elicited that he would rather have his attorneys withdraw than permit them to go on with the diminished capacity defense, he stated ambiguously, "And I still seek further counsel or either

I will do it myself."

The court viewed appellant's motion at least in part as an untimely request to represent himself. When a defendant moves during a trial to represent himself, the court is not required to grant that motion. Rather, it must inquire into the factors underlying the request, in order to create an adequate record for possible appellate review. (People v. Joseph (1983) 34 Cal.3d 936, 944, fn. 2.) It should consider factors such as the reasons for the request, the quality of counsel's representation, the length and stage of the proceedings, and the disruption or delay which might reasonably be expected to follow the granting of such a motion. Thereafter, whether to grant or deny the motion is a matter for the trial court's discretion. (People v. Windham (1977) 19 Cal.3d 121, 128-129; cf. People v. Joseph, supra, 34 Cal.3d at pp. 943-948 [timely pretrial motion to represent self must be granted provided defendant has mental capacity to waive right to counsel with realization of probable risks and consequences].)

Here the trial court heard appellant explain that he did not like the diminished capacity defense. However, the court also assessed counsels' representation of appellant, and concluded that given the evidence, they would be subject to criticism as ineffective if they did not present a diminished capacity defense. The trial was in its eighth day, and appellant had not raised any previous objections, even when his attorney informed the jury in his opening statement of the thrust of the defense. If what appellant wanted was to represent himself, he has failed

to establish any abuse of discretion in the denial of that untimely request.

If what appellant wanted was a substitution of counsel, it is settled that a trial court has discretion to deny a motion for a continuance to secure new counsel if the motion is made during trial. (People v. Molina (1977) 74 Cal.App.3d 544, 549.) Whether a motion to relieve counsel should be granted depends on whether failure to grant the motion would substantially impair or deny the right to assistance of counsel. (People v. Joseph, supra, 34 Cal.3d at p. 944, fn. 3.) Here it is apparent that appellant's right to assistance of counsel was not impaired and appellant has failed to establish any abuse of discretion.

The cases relied on by appellant are inapposite. United States v. Williams (1979) 594 F.2d 1258 involved a motion for substitution of counsel made approximately a month before trial, not a midtrial motion such as appellant's. (Id., at pp. 1259-1261.) Similarly, in Brown v. Craven (1970) 424 F.2d 1166, defendant made four separate pretrial motions for a new attorney, and defense counsel also informed the court of his client's dissatisfaction with his representation prior to the commencement of trial. (Id., at pp. 1169-1170, fn. 3.) People v. Stankewitz (1982) 32 Cal.3d 80 is similar to this case only in that a disagreement arose between defendant and his lawyer, who believed that defendant's position was the irrational result of a mental condition. Unlike appellant's case, however, the disagreement in Stankewitz arose prior to trial; the issue was whether the trial court properly refused either to order a hearing on defendant's

competency to stand trial or to grant a request for substitution of counsel despite substantial psychiatric evidence that while defendant was unable to assist his public defender in a rational manner, he might be able to cooperate with another lawyer. (Id., at pp. 91-94.)

Appellant also contends that the prosecutor committed prejudicial misconduct during cross-examination of Drs. Bastien and Davis, and during closing argument.

First, appellant made no objection at trial to two of the closing argument statements and one of the questions which he now cites as misconduct. Without deciding whether the remarks and question constituted misconduct, we conclude that a timely objection and admonition would have cured any harm flowing therefrom; accordingly, they may not be challenged for the first time on appeal. (People v. Green (1980) 27 Cal.3d 1, 34-35.)

Appellant contends that contrary to the court's ruling that there be no mention of his having been found not guilty by reason of insanity of murder in 1972, the prosecutor referred to a statement appellant made to a psychiatrist in 1970 about cutting a devil's throat. However, the record refutes appellant's contention. The prosecutor did not violate the court's ruling; on the contrary, prior to mentioning the statement, the prosecutor consulted with the court, which expressly ruled that the statement was admissible.

Appellant argues that a portion of the prosecutor's closing argument was misconduct because it suggested that defense counsel had made up the defense (i.e., referring to psychiatric

testimony as a "song and dance" or "bag of tricks"). We disagree with appellant's characterization of these remarks. While they unquestionably indicated skepticism as to the reasonableness of the experts' conclusions about appellant's mental state, they did not suggest that defense counsel had fabricated the diminished capacity defense. (Cf. People v. Bain (1971) 5 Cal.3d 839, 845-847.)

As for the remaining cross-examination which was objected to at trial, our review of the record persuades us that appellant has exaggerated the effect of these questions. Even if we assume ~~arg~~uendo that each was misconduct, their cumulative effect was undoubtedly harmless beyond a reasonable doubt, and no miscarriage of justice has occurred. (See People v. Green, supra, 27 Cal.3d at p. 35; People v. Bolton (1979) 23 Cal.3d 208, 214-215; cf. People v. Hudson (1981) 126 Cal.App.3d 733, 735-742.)

Judgment is affirmed.

Scott, J.

We concur:

White, P.J.

Barry-Deal, J.